

**UNITED  
NATIONS**

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International Tribunal for the Prosecution of  
Persons Responsible for Serious Violations of  
International Humanitarian Law Committed in  
the Territory of Former Yugoslavia since 1991

Case No. IT-01-42-T

Date: 31 January 2005

Original: English

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**IN TRIAL CHAMBER II**

**Before:** **Judge Kevin Parker, Presiding**  
**Judge Krister Thelin**  
**Judge Christine Van Den Wyngaert**

**Registrar:** **Mr. Hans Holthuis**

**Judgement of:** **31 January 2005**

**PROSECUTOR**

v.

**PAVLE STRUGAR**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Ms. Susan Somers  
Mr. Philip Weiner

**Counsel for the Accused:**

Mr. Goran Rodić  
Mr. Vladimir Petrović

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## I. INTRODUCTION

1. The Accused, Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples' Army (JNA), is charged in the Indictment with crimes allegedly committed from 6 to 31 December 1991, in the course of a military campaign of the JNA in and around Dubrovnik in Croatia in October, November and December of 1991.

2. The Indictment, as ultimately amended, alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two<sup>1</sup> were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion, and the arts and sciences, were damaged. These allegations support six counts of violations of the laws or customs of war under Article 3 of the Statute of the Tribunal, namely murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, attacks on civilian objects and destruction of institutions dedicated to, *inter alia*, religion, and the arts and sciences. The Accused is charged with individual criminal liability under Article 7(1) of the Statute for allegedly ordering, and aiding and abetting, the aforementioned crimes, as well as with superior responsibility pursuant to Article 7(3) of the Statute for the crimes of his subordinates. The Accused's liability is alleged to arise out of the position he then held as commander of the Second Operational Group (2 OG). It is alleged that it was, *inter alia*, forces of the 3<sup>rd</sup> Battalion of the 472<sup>nd</sup> Motorised Brigade (3/472 mtbr) under the command of Captain Vladimir Kovačević, which unlawfully shelled the Old Town on 6 December 1991. The battalion commanded by Captain Kovačević was at the time directly subordinated to the Ninth Military Naval Sector (9 VPS), commanded by Admiral Miodrag Jokić, and the 9 VPS, in turn, was a component of the 2 OG, commanded by the Accused.<sup>2</sup>

3. While the Indictment is confined to the attack on the medieval Old Town, the evidence indicates that the JNA shelling that day was not confined to the Old Town and that there were also human casualties and property damage to the extended and more modern parts of the city of Dubrovnik which adjoin the Old Town but which are outside the historic walls.

4. The Chamber observes that Admiral Jokić has pleaded guilty to six counts, alleging violations of the laws or customs of war punishable pursuant to Articles 3, 7(1) and 7(3) of the Statute, relating to the attack on Dubrovnik on 6 December 1991. He was subsequently sentenced

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<sup>1</sup> The Third Amended Indictment alleges that three people were seriously injured. In its Rule 98bis Decision, the Trial Chamber found that there was not enough evidence capable of sustaining a conviction in respect of Nikola Jović on Count 2, cruel treatment.

<sup>2</sup> Indictment, paras 3 and 12.

by this Tribunal to seven years imprisonment.<sup>3</sup> The case against Captain Kovačević, also indicted for the attack, is still pending.

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<sup>3</sup> *Jokić* Sentencing Judgement. The Judgement is presently pending appeal. Admiral Jokić, Captain Kovačević, the Accused and a fourth named indictee were originally charged together in February 2001 for violations of the laws or customs of war committed by alleged attacks on Dubrovnik between 1 October and 31 December 1991. The charges against the fourth individual were withdrawn in July 2001, and the cases against the remaining three were eventually separated.

## **II. CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE**

5. In the present decision, the Chamber is to determine the innocence or the guilt of the Accused on each of the six counts of the Indictment. Article 21(3) of the Statute enshrines the presumption of innocence to which each accused is entitled. This presumption places on the Prosecution the burden of establishing the guilt of the Accused, and that burden remains on the Prosecution throughout the entire trial. The standard to be met for a conviction to be entered against an Accused is that of proof beyond reasonable doubt.<sup>4</sup> Accordingly, the approach taken by the Chamber has been to determine in respect of each of the six counts, whether it is satisfied beyond reasonable doubt, on the basis of the whole of the relevant evidence, that each element of that crime and the forms of liability charged in the Indictment have been established. As is usual in criminal cases, in determining whether an element of a count has been established, it has often been necessary to draw inferences from the facts established by the evidence. In so doing the Chamber has been careful to consider whether an inference reasonably open on these facts was inconsistent with the guilt of the Accused. If there was, the onus and the standard of proof would require an acquittal to be entered in respect of that count.<sup>5</sup>

6. The Chamber has been required to weigh and evaluate the evidence presented by both parties. The nature of the case is such that the Chamber has been faced with a large amount of evidence, characterised by contradiction and inconsistency, in order to determine relatively few issues. In respect of some issues, the task of the Chamber has been made more difficult because witnesses who played a material role have not been called to give evidence, and because some relevant records and documents have not been located.

7. In weighing the evidence, the Chamber has kept in mind that the many years that have passed since these events are likely to have affected the accuracy and reliability of the memories of witnesses, understandably so. However, the Chamber is also persuaded that in some cases, the evidence it has heard was not entirely truthful. For example, some of the JNA witnesses who came to testify left the Chamber with a clear impression that they were seeking in their evidence to minimise or misrepresent their involvement in the events of 6 December 1991. In a similar way, some of the Croatian witnesses, albeit at times possibly unwittingly, appeared to exaggerate the account of the damage sustained on that particular day or failed to distinguish that damage from that sustained during previous shellings in October and November 1991, or an earlier earthquake. Others sought to minimise the extent of the Croatian military presence in Dubrovnik. Further, even

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<sup>4</sup> Rule 87(A) of the Rules provides, in its relevant part: “[...] A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt.”

<sup>5</sup> *Čelebić Appeals Judgement*, para 458.

more regrettably, the Chamber has also been forced to conclude that some of the oral and documentary evidence is deliberately contrived and false. These various factors, in particular, have had the effect in this case that in respect of a number of witnesses the Chamber's assessment of the personal credibility of the witness as the evidence was given has been most material to the Chamber's acceptance or rejection of evidence of that witness, whether in whole or in part. The Chamber has found that the general background circumstances to material events, and the actual course of material events, at times has offered valuable assistance in the task of determining where the truth lies in a body of conflicting and inconsistent oral and documentary evidence about a particular issue.

8. The Chamber also notes that there were times in the course of the trial where the oral evidence of a witness was not identical to the account given in a prior statement. While this called for scrutiny of the credibility of the witness, the Chamber also accepts what has been expressed by other Trial Chambers that "it lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court."<sup>6</sup> A witness may also forget some matter or become confused. The Chamber has taken these considerations into account when determining the weight to be given to any such particular evidence.

9. In some cases only one witness has given evidence on a fact material to this case. Of course, the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.<sup>7</sup> The Chamber has, however, scrutinised the evidence of the single witness in such cases with particular care before relying upon it.

10. Despite these circumstances, after having carefully reviewed and weighed all the evidence, the Chamber has been able to make findings on the facts in this case sufficient for it to be able to determine the innocence or the guilt of the Accused on each count. However, the Chamber has not been able to resolve all disputed factual matters. The nature of the case and of the evidence in some respects rendered this exercise impossible or too complex. As will be seen, the Chamber has accepted some evidence notwithstanding the presence of contradicting or inconsistent evidence. At times, the Chamber rejected evidence despite the presence of other consistent evidence. At times, the Chamber has been persuaded it should accept only part of the evidence of a witness, while rejecting other parts. Where this has occurred it has been done in light of the other evidence on the issue and only after very careful scrutiny indeed of the witness and the evidence.

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<sup>6</sup> *Naletilić* Trial Judgement, para 10; *Vašiljević* Trial Judgement, para 21.

<sup>7</sup> *Aleksovski* Appeals Judgement, para 62.

11. Finally, the Chamber recalls Article 21(4)(g) of the Statute which provides that no accused shall be compelled to testify against him or herself. The Accused in the present case decided not to testify at trial. The Chamber has not, of course, attached any probative relevance to his decision.

### **III. THE CONTEXT IN WHICH THE ATTACK OF 6 DECEMBER 1991 TOOK PLACE**

#### **A. General background**

12. The Chamber will now turn to consider the broader context in which the alleged unlawful attack on the Old Town of Dubrovnik took place.

13. In 1991 the Socialist Federal Republic of Yugoslavia (SFRY) experienced a series of events which ended in the break-up of the six republic federal state.<sup>8</sup> It involved initially the quest for independence by the Republics of Slovenia and Croatia.<sup>9</sup> The developments in the SFRY eventually involved the international community, and especially the then European Community (EC) and the United Nations (UN).<sup>10</sup> In the following, some of the more important dates and actions are described as they emerge from the evidence in the case or are historical facts of common knowledge. This brief overview serves as an important background to the case.<sup>11</sup>

14. In 1991, the federal government formally controlled the armed forces of the SFRY, the JNA and the Territorial Defence (TO).<sup>12</sup> The JNA and the TO were under the Supreme Command of the SFRY Presidency.<sup>13</sup> The Federal Secretary for National Defence<sup>14</sup> at the time was General Kadijević and his deputy was Admiral Brovet.<sup>15</sup>

15. On 25 April 1991, a referendum on the independence of Croatia was held.<sup>16</sup> The result of this referendum was that Croatia would not remain in the SFRY as a unified state, but that it would become independent, with the possibility of forming alliances with other republics.<sup>17</sup> On 25 June 1991, the Croatian Parliament purported to ratify the result by passing a constitutional decision on

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<sup>8</sup> Exhibit P20, tab 9 (Badinter Commission Opinion No. 1). The SFRY was composed of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

<sup>9</sup> See *infra*, para 15. Republic of Slovenia Assembly Declaration of Independence, 25 June 1991.

<sup>10</sup> UNSC Resolution 713 (1991) of 25 September 1991; UNSC Resolution 721 (1991) of 27 November 1991; UNSC Resolution 724 (1991) of 15 December 1991; EC Declaration on the Situation in Yugoslavia, adopted at the Extraordinary EPC Ministerial Meeting, The Hague, 5 July 1991(EC Press Release p 61/91); Memorandum of Understanding on the Monitor Mission to Yugoslavia, 13 July 1991 (Review of International Affairs, Vol. XLII (5.X-5. XI 1991), p 21.

<sup>11</sup> In this section, the Chamber has taken judicial notice of facts of common knowledge pursuant to Rule 94 (A) of the Rules, which provides: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof".

<sup>12</sup> JNA is the acronym for "Jugoslavenska Narodna Armija"

<sup>13</sup> Exhibit P204 (Expert Report of Milovan Zorc). Command and control of the armed forces was executed by the Federal Secretary of National Defence in accordance with the authority invested in him by the SFRY Presidency. In the event of the Federal Secretary's absence, the chief of the General Staff acted as his deputy.

<sup>14</sup> Also referred to as the Minister of Defence.

<sup>15</sup> Admiral Jokić, T 3869-3870; 4111-4113.

<sup>16</sup> Exhibit P20, tabs 2, 3, 4; Ljerka Alajbeg, T 672-674.

<sup>17</sup> Ljerka Alajbeg, T 672-674.

the sovereignty and independence of Croatia.<sup>18</sup> Both the referendum and the decision on independence were challenged by the Yugoslav federal government.<sup>19</sup> During the summer of 1991 the functioning of the federal government was adversely affected as a consequence of these developments. Croatia made a declaration of independence on 8 October 1991.<sup>20</sup>

16. In late August 1991, the JNA took control of Kijevo (a Croatian village surrounded by Serbian held territory) and moved on Vukovar, a Croatian town in eastern Slavonia, bordering the Republic of Serbia. Croatia then laid siege to JNA barracks and installations across the Republic.<sup>21</sup> The JNA then surrounded Vukovar and bombarded the town for two months until its fall in November 1991.<sup>22</sup> The siege of Vukovar by the JNA came to be seen as a symbol of Croatia's struggle for national liberation, winning international attention.

17. In response to the growing tensions in Croatia and the unfolding of a war also in the Republic of Bosnia and Herzegovina, Lord Carrington, who was appointed by the President of the EC Council of Foreign Ministers, the Dutch Foreign Minister Hans van den Broek,<sup>23</sup> was asked to broker a comprehensive peace settlement in Yugoslavia.<sup>24</sup> During the Dutch Presidency of the EC, the European Community Monitoring Mission (ECMM) was introduced into the region.<sup>25</sup> Lord Carrington chaired the first session of a peace conference in The Hague on 7 September 1991 attended by the Presidents of the six Yugoslav republics.<sup>26</sup> On 8 November 1991, an EC summit in Rome recommended trade sanctions, including an oil embargo, on Yugoslavia.<sup>27</sup> The international peace process shifted from the EC to the UN when the UN Secretary General appointed Cyrus

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<sup>18</sup> Ljerka Alajbeg, T 672-674; Nikola Samardžić, T 970.

<sup>19</sup> Ljerka Alajbeg, T 671; T 2829. On 5 December, 1991 the Croatian Parliament declared that it would no longer recognize the authorities in Belgrade: "In accordance with the decision of the Assembly of the Republic of Croatia of 8 October 1991, by which the legitimacy and legality of all bodies of the former Socialist Federal Republic of Yugoslavia was revoked, the Assembly of the Republic of Croatia does not recognise, and rejects all activities by Ante Marković, Prime Minister of the former federal government and Budimir Lončar, a minister in that government, that could have consequences of any kind for the Republic of Croatia": P20, tab 8, Decision dated 5 December 1991, para 8. *See also* Ljerka Alajbeg, T 2830-2831.

<sup>20</sup> Ljerka Alajbeg, T 2796-2797; Exhibit P20, tab 7.

<sup>21</sup> *See infra*, paras 26 and 27.

<sup>22</sup> Minister Rudolf during his testimony stated that by 28 November 1991 Vukovar had fallen, T 5476-5477. Paul Davies testified that there was large scale fighting in Vukovar, T 573.

<sup>23</sup> Admiral Jokić, T 4522-4528.

<sup>24</sup> Declaration on the Occasion of the Ceremonial Opening of the Conference on Yugoslavia, Peace Palace, The Hague, 7 September 1991.

<sup>25</sup> Memorandum of Understanding on the Monitor Mission to Yugoslavia, 13 July 1991(Review of International Affairs, Vol XLII (5.X-5.XI 1991), p 21. The EC established the European Commission Monitor Mission (ECMM) in Croatia to broker a ceasefire between the parties with the aim of putting an end to the siege of the JNA barracks, Per Hvalkov, T 2236.

<sup>26</sup> Declaration on the Occasion of the Ceremonial Opening of the Conference on Yugoslavia, Peace Palace, The Hague, 7 September 1991. Nikola Samardžić recalls meeting the President of the Republic of Croatia, Franjo Tuđman and the President of the Republic of Montenegro, Momir Bulotavic during the conference in The Hague, T 1185-1188.

<sup>27</sup> EC Declaration on the Suspension of the Trade and Cooperation Agreement with Yugoslavia, Rome, 8 November 1991. Previously, on 25 September 1991, the UN had imposed an arms embargo against all the former Yugoslavia. *See*, UNSC Resolution 713 (1991) of 25 September 1991.

Vance, a former US Secretary of State, as the personal envoy of the UN Secretary General to Yugoslavia. Cyrus Vance's plan was to deploy a UN peace-keeping force in Croatia.<sup>28</sup>

18. The EC invited all Yugoslav republics, which so wished, to apply for recognition by 24 December 1991. The applications would then be considered by an Arbitration Commission, the so-called Badinter Commission, which would verify whether the republics satisfied the conditions for EC recognition by 15 January 1992. Although, the Badinter Commission expressed the opinion that Croatia did not meet the conditions for recognition,<sup>29</sup> Croatia eventually gained EC recognition on 15 January 1992.<sup>30</sup>

## **B. Dubrovnik before October 1991**

### **1. The broader Dubrovnik, the city of Dubrovnik and the Old Town**

19. The broader municipality of Dubrovnik extends for approximately 120 kms along the coast of southern Dalmatia in present-day Croatia.<sup>31</sup> It borders with Montenegro to the south and with Bosnia and Herzegovina to the east.<sup>32</sup> The city or town of Dubrovnik is comprised of the area from Sustjepan to the northwest to Orsula in the southeast, and includes the island of Lokrum situated to the southeast of the Old Town.<sup>33</sup>

20. The part of Dubrovnik known as the Old Town is an area of some 13.38 hectares enclosed by the medieval city walls. The Old Town is situated between the Adriatic Sea on one side and steep slopes on the other. These slopes ascend to Mount Srd, the dominant topographical feature of Dubrovnik, which overlooks the Old Town.<sup>34</sup>

21. The Old Town of Dubrovnik is endowed with an exceptional architectural heritage, including palaces, churches and public buildings.<sup>35</sup> The city first rose to prominence as a significant trading centre in the 13<sup>th</sup> century,<sup>36</sup> and the oldest buildings in the Old Town date from this period.<sup>37</sup> The fortifications of the Old Town, begun in the 12<sup>th</sup> century and completed in the

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<sup>28</sup> The so called Vance Peace Plan on the UN peacekeeping operation in Yugoslavia was submitted to the UN Security Council as an annex to the Report of the Secretary General Boutros Boutros Ghali to the UN Security Council (UN Doc S/23280, Annex).

<sup>29</sup> Ljerka Alajbeg, T 689-691. *See* Opinion No 5, Exhibit P20, tab 9. Croatia had not incorporated into its constitution the adequate protection of national minorities' rights, Ljerka Alajbeg, T 690.

<sup>30</sup> Ljerka Alajbeg, T 686. A number of states recognized Croatia as an independent state before EC recognition, among which: the Holy See, Latvia, Estonia and San Marino, Ljerka Alajbeg, T 685.

<sup>31</sup> Exhibit P14 (Expert Report of Dr John Allcock), p 1.

<sup>32</sup> John Allcock, T 527-528; *see* Annex III.A.

<sup>33</sup> The terms "city" or "town" are used interchangeably throughout the judgement.

<sup>34</sup> John Allcock, T 467-470; *see* Annex III.C and III.D.

<sup>35</sup> Exhibit P14, p 6.

<sup>36</sup> Exhibit P14, p 2.

<sup>37</sup> Exhibit P14, p 3.

mid 17<sup>th</sup> century, are widely regarded as some of the finest examples of city fortifications in Europe.<sup>38</sup> Demilitarisation of this historic area was a precondition to the recognition of the Old Town as a World Heritage site by UNESCO in 1979.<sup>39</sup> One of the unique features of the Old Town is that it has remained a living city. In fact, in 1991, the Old Town had an estimated population of between 7,000 and 8,000 residents.<sup>40</sup> Within its city walls, the Old Town is fairly densely populated. Its palaces, which would previously have housed not more than a single noble family, have been divided up into flats and line the narrow streets of the Old Town. Stradun is the main street bisecting the Old Town on a west east axis.<sup>41</sup>

## 2. Croatian forces in Dubrovnik

22. The Republic of Croatia did not have its own armed forces.<sup>42</sup> Around March 1991, Croatia established the Croatian National Guards Corps (“ZNG”) within the framework of the MUP (*i.e.* the police).<sup>43</sup> The ZNG had a brigade based in Dubrovnik, the 116<sup>th</sup> Brigade, which later became the 163<sup>rd</sup> Brigade.<sup>44</sup> Croatian paramilitary forces were also present in Dubrovnik and participated in the October – December 1991 combat operations in Dubrovnik along with the members of the ZNG and the MUP.<sup>45</sup>

## 3. JNA forces around Dubrovnik

23. The JNA forces positioned in the area of Dubrovnik were under the command of the 2 OG, a formation at the level of an army, which was established in mid September 1991 and continued in existence into 1992. The 9 VPS, among other units, was directly subordinated to the 2 OG throughout the whole period from October to the end of December 1991 and into 1992. The 472 mtbr was subordinated to the 9 VPS from 25 October to 20 November 1991 from which date, apart from its third battalion, it came under the direct command of the 2 OG. However, the 3/472 mtbr remained directly subordinated to the 9 VPS from 20 November 1991.<sup>46</sup> The 2 OG reported directly to the Federal Secretary for National Defence.<sup>47</sup>

24. The Accused was appointed commander of the 2 OG on 12 October 1991 and remained in this position into 1992. Admiral Jokić assumed the command of the 9 VPS on 7 October 1991 and

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<sup>38</sup> Exhibit P14, p 5.

<sup>39</sup> Exhibit P14, p 16.

<sup>40</sup> See generally, John Allcock, T 461-464.

<sup>41</sup> John Allcock, T 472.

<sup>42</sup> In fact the TO existed within the framework of the SFRY forces, Admiral Jokić, T 4604-4607.

<sup>43</sup> Minister Rudolf, T 5730-5731.

<sup>44</sup> Admiral Jokić, T 4607-4618.

<sup>45</sup> Admiral Jokić, T 4613.

<sup>46</sup> See *infra*, para 383.

<sup>47</sup> Exhibit P204, pp 7 and 28.

remained on this position into 1992. At 25 October 1991 and into 1992 Captain Kovačević was the commander of the 3/472 mtbr.<sup>48</sup>

25. In the period October to December 1991 the JNA units positioned in the region of Dubrovnik included a significant number of reservists and volunteers. Due to the departure of Croatian soldiers from the JNA in 1991, the units were mobilised hastily, primarily from soldiers from Montenegro and Herzegovina, and included a significant percentage of reservists who had not been fully trained for their roles.<sup>49</sup> On 19 September 1991, the commander of the 472 mtbr, Colonel Nojko Marinović, left his command and joined the Croatian side in Dubrovnik where he led the Croatian defence of the city. His departure had a negative effect on the morale of the JNA soldiers as they feared that he would transmit important intelligence information to the Croatian forces.<sup>50</sup>

### C. Combat operations around Dubrovnik before October 1991

#### 1. JNA blockade by Croatian forces

26. In August 1991, Croatian forces laid siege to JNA barracks and installations across the Republic pursuant to a decision of the leadership of Croatia.<sup>51</sup> Electricity and water supplies were cut off and telephone lines were disconnected.<sup>52</sup> During the siege of the JNA barracks, the Croatian forces seized JNA weaponry.<sup>53</sup>

27. The JNA barracks of the 9 VPS at Ploče were attacked and soldiers were killed. There were attacks in Šibenik, Zadar, Pula and Split. The Divulje garrison as well as the port of Lora were also blockaded.<sup>54</sup> Additionally, during this period, attacks on JNA military convoys that were en route from Boka to Trebinje were carried out by the ZNG near the Prevlaka area and in Konavle.<sup>55</sup>

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<sup>48</sup> See *infra*, para 386.

<sup>49</sup> Admiral Jokić, T 3840-3841; T 3863-3867; T 4421; Captain Pepić, T 7473-7475; Lieutenant-Colonel Stojanović, T 7792-7793.

<sup>50</sup> Lieutenant-Colonel Pavilić, T 6893-6894; Lieutenant Lemal, T 7336-7337; 7385; Admiral Jokić, T 4390.

<sup>51</sup> Attacks on the facilities and members of the JNA in Croatia had taken place even before August, e.g. an incident in May 1991 in front of the headquarters of the naval military district in Split, when a soldier was strangled and killed in an armoured tank: Admiral Jokić, T 4370.

<sup>52</sup> Admiral Jokić, T 4372-4375; Slobodan Novaković, T 6810-6813; Lieutenant-Colonel Đurašić, T 6954; Adrien Stringer, T 309.

<sup>53</sup> Admiral Jokić, T 4372-4375.

<sup>54</sup> Admiral Jokić, T 4372-4375.

<sup>55</sup> Admiral Jokić, T 4433-4434.

## 2. Mobilisation of Croatian and JNA forces

28. The evidence indicates that in the summer of 1991, Croatian forces were mobilized towards the border with Montenegro, in the territory of Konavle, and towards Bosnia-Herzegovina, in Rijeka Dubrovačka, Brgat and Mokošica.<sup>56</sup>

29. In September 1991, hostilities between the JNA and Croatian forces began in the south coastal area of Croatia. The JNA began slowly advancing towards Dubrovnik forcing the Croatian forces to retreat from Dubrovnik's hinterland.<sup>57</sup> Mortar shells were fired every day at the village of Bani, which is in the immediate vicinity of the border with Montenegro and at the village of Dubravka.<sup>58</sup>

30. At the same time the JNA units from Pula, Split and Šibenik were transferred towards Dubrovnik (*i.e.* in Kumbor and Tivat, within the area of the Bay of Kotor in Montenegro).<sup>59</sup> On 27 September three patrol boats of the 9 VPS were pulled out from Pula and moved to Boka.<sup>60</sup> The dislocation and resettlement of military equipment and material, manpower and garrisons, mostly belonging to the 9 VPS, took place from the territory of the Republic of Croatia to the Zelenika and Bar ports located in Montenegro.<sup>61</sup>

## 3. JNA directive to blockade Dubrovnik

31. On 30 September 1991, pursuant to an order of the General Staff of the SFRY, the Commander of the 2 OG at the time, Lieutenant-General Jevrem Cokić, issued to subordinate units a directive to blockade Dubrovnik.<sup>62</sup> The directive provided for the following deployment of forces:<sup>63</sup>

[...] Using most of the forces, to go on the attack from the current sectors, deploying main forces on these axes: Ljubinje – Zavala – Slano; Ljubovo village – Ivanica - Čibači and Grab – Dubravka – Molunat; while auxiliary forces will secure features and the Mostar airport and in the Neretva valley with the following objective: with air, artillery and naval support, operating simultaneously and forcefully to defeat forces along the attack axes and reaching the coastline, to cut off the Adriatic highway at several points along the Slano – Prevlaka section, to seal off Dubrovnik, Čilipi Airport and Prevlaka from the land and sea, and to prevent enemy forces from manoeuvring;

<sup>56</sup> Captain Negodić, T 5150; see Annex III.A.

<sup>57</sup> Nikola Samardžić, T 997-1000; T 1268-1271.

<sup>58</sup> Captain Negodić, T 5164-5165.

<sup>59</sup> Captain Drljan T 7689-7690.

<sup>60</sup> Captain Drljan, T 7685-7686.

<sup>61</sup> Lieutenant-Colonel Đurašić, T 6954-6955.

<sup>62</sup> On 29 September 1991 the Commander Jevrem Cokić issued a draft directive for an attack and addressed it to the General Staff of the SFRY, Colonel General Blagoje Adžić, for confirmation (D44). According to the established procedure, the General Staff was to confirm the directive and a subsequent order was to be issued by the Commander of the 2 OG to all subordinate units, pursuant to the order from the General Staff. Admiral Jokić testified that there was another directive dated 30 September 1991, which was similar in terms of the objectives, tasks and commands to those specified in Exhibit D44, T 4441-4443.

<sup>63</sup> Admiral Jokić, T 4436-4437; Exhibit D44.

then, providing support from the direction of Ploče, to engage in destroying and disarming the surrounded enemy forces, and to be in a state of readiness for further offensive operations in western Herzegovina.<sup>64</sup>

32. The 2 OG at the time comprised the following units: the 37th Corps, the 472 mtbr (without the 4<sup>th</sup> Battalion and Combat Group-1), the 1<sup>st</sup> TO Brigade of the 3<sup>rd</sup> Partisan Division and the 9 VPS with the 4<sup>th</sup> Battalion of the 472 mtbr (4/472 mtbr). Each of these units had its own task in this operation.<sup>65</sup>

33. The 37 Corps was tasked to attack the axis of Ljubinje – Ravno – Slano and also to occupy and defend the airport and features in the Mostar sector and the Neretva valley. To fulfil this task they were to provide for unhindered use of the airport, reach the coast, cut off the road and reach the Slano Bay, isolate Dubrovnik and prevent the enemy from manoeuvring or intervening from the direction of Ploče. Additionally, they had to raid part of the forces of a mountain battalion in the Čapljiana sector.<sup>66</sup>

34. The 472 mtbr with one battalion of the Titograd TO Brigade was assigned to the axis of Taleža – Zaplanik village – Zaton, and Ljubovo – Ivanica - Čibača. Their task was to cut off the road in the sectors of Zaton and Čibača, to block Dubrovnik and cut off the airport of Čilipi. Then by securing the flanks prevent intervention towards Dubrovnik and start disarming and defeating enemy forces.<sup>67</sup>

35. The 1 TO Brigade of the 3<sup>rd</sup> Partisan Division was to attack from the line of Ograde village – Grab village along the general axis of Grab – Dubravka village – Pločice. Their task was to get to the road and cut it off in the sectors of Poljice and Mikulići, to block the airport of Čilipi from the eastern side and establish direct contact with the 4/472 mtbr and then engage in defeating enemy forces in the sector of Gruda. The Sutorina feature and Prevlaka were already territories under JNA control.<sup>68</sup>

36. The 9 VPS, with the 4/472 mtbr, using land forces and in coordination with the Titograd TO Brigade was to destroy enemy forces and control Prevlaka and with naval forces, to exercise control over entry to the Bay of Kotor, to prevent enemy manoeuvres or operations and support the land forces by naval artillery and, finally, to be ready to carry out a landing from the sea when necessary.<sup>69</sup>

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<sup>64</sup> Exhibit D44, para 1.

<sup>65</sup> Admiral Jokić, T 4438.

<sup>66</sup> Admiral Jokić, T 4439; Exhibit D44, para 2 (a).

<sup>67</sup> Admiral Jokić, T 4439; Exhibit D44, para 2 (b).

<sup>68</sup> Admiral Jokić, T 4439-4440; Exhibit D44, para 2 (c).

<sup>69</sup> Admiral Jokić, T 4440; Exhibit D44, para 2 (d).

37. The Titograd TO Brigade (without the 1<sup>st</sup> Battalion) formed the reserve of the 2 OG in the Trebinje sector and was to be on the ready to be brought into the attack along the Trebinje – Dubrovnik and Trebinje – Čilipi axis.<sup>70</sup>

38. The directive specified that the command post of the 2 OG would be in the Kifino Selo sector and that the forward command post of the 2 OG would be in Trebinje.<sup>71</sup> It was ordered that when the attack started, the harbour of Dubrovnik should be blockaded so that all civilian and foreign ships could not approach the shore and carry out an attack.<sup>72</sup>

39. According to Admiral Jokić, the naval blockade of Dubrovnik ordered on 30 September 1991 was meant to prevent the arming of Croatian forces in Dubrovnik. It was carried out on the basis of the UN arms embargo in all the former Yugoslavia.<sup>73</sup> According to another witness, the mobilisation of the JNA around Dubrovnik was indicative that the JNA was prepared to start combat operations in the area.<sup>74</sup> Adrien Stringer gave evidence that Dubrovnik was blockaded so that supplies could not get through.<sup>75</sup>

#### **D. Combat operations around Dubrovnik in October 1991**

40. According to witness Nikola Samardžić, on 1 October 1991, during a meeting at the seat of government in Montenegro, the Accused declared that Montenegro had been attacked. It was Nikola Samardžić's evidence that the President of Montenegro, Momir Bulatović, and the Accused spoke of about 30,000 "Ustashas"<sup>76</sup> being ready to attack Boka Kotorska in Montenegro. It appears that neither the alleged attack, nor the 30,000 figure were correct. By virtue of this "attack", the Yugoslav Ministry of the Interior agreed to put the TO and the special police units at the disposal of the army to assist in operations on the Croatian border.<sup>77</sup> The mobilisation of a special police unit and a reinforced infantry company was ordered to be conducted on 2 October 1991. This unit was tasked to carry out "combat operations of the armed forces in the conflict of war on the border of the Republic of Montenegro and the Republic of Croatia" and, together with the JNA and TO units, to "perform specific military and police tasks in accordance with the Mission Plan to be devised by

<sup>70</sup> Admiral Jokić, T 4440; Exhibit D44, para 2 (e).

<sup>71</sup> Admiral Jokić, T 4440; Exhibit D44, para 5.

<sup>72</sup> Admiral Jokić, T 4441; Exhibit D44, para 6 (c).

<sup>73</sup> Admiral Jokić, T 3823-3825.

<sup>74</sup> Lieutenant-Colonel Đurašić, T 6954.

<sup>75</sup> Adrien Stringer, T 310.

<sup>76</sup> "Ustasha" is a negative term and was used to denote the independent military formations of the independent state of Croatia in WWII. In 1991, it was a serious word to use. Montenegrin politicians started to use this term in 1991 to refer to the entire Croatian population: Nikola Samardžić, T 970. The Defence's position is that the official terminology used by the Federal Secretary of National Defence and the Chief of General Staff of the SFRY armed forces was that Croatian paramilitary units should be referred to as "Ustashas". See Defence Final Brief, para 58.

<sup>77</sup> Nikola Samardžić, T 992-993.

the Operative Command on the Dubrovnik front.”<sup>78</sup> Pursuant to this order, the Montenegrin Minister of Interior, Pavle Bulatović, issued a subsequent order to “reinforce [this] unit by members of the Special Platoon of the Special Unit and by policemen of the Titograd CB /Security Centre/, Nikšić CB and Bar CB.”<sup>79</sup> According to witness Nikola Samardžić, when the meeting was over, it was clear that there would be a JNA campaign to conquer Dubrovnik and its territory.<sup>80</sup>

41. On 1 October 1991, the JNA attacked the area surrounding the city of Dubrovnik from Montenegro.<sup>81</sup> The highway was targeted.<sup>82</sup> A JNA warship targeted the area just above the Zlatni Potok (south of the Old Town). Later two JNA aircraft targeted Srd, while the warships near Lokrum fired at Lokrum and Bosanka.<sup>83</sup>

42. At the same time, two JNA warships sailed from the island of Mljet to the island of Lapad in the channel between Lopud and Orašac. They opened fire at trucks and other vehicles leaving Slano on a road leading to Dubrovnik.<sup>84</sup> On 3 or 4 October 1991 when Slano fell, the ships withdrew and the road was blocked.<sup>85</sup>

43. On 5 October 1991, the command of the JNA naval sector blocked the entire area of the Adriatic along the coast.<sup>86</sup> This naval blockade was lifted on 11 October 1991 by an order of the command of the VPO (military naval district). However, the blockade of Dubrovnik remained in force and vessels were not allowed to sail unconditionally and had to report their movements.<sup>87</sup>

44. In the period from 23 to 26 October 1991, the JNA conducted combat operations in the region east and northeast of the city of Dubrovnik. On 23 October 1991 the Accused issued an “Order for Further Action,” which directed the 9 VPS, the 472 mtbr and its subordinate units to undertake military actions against targets in the region of Dubrovnik along the line of Ivanica, Donji Brgat and Dubrava.<sup>88</sup> Attached to the order was a plan for artillery action, proposed by the Chief of Staff of the 2 OG and approved by the Accused, which provided for certain action to be taken by land, air and sea artillery units. The order did not contain any prohibition of attacks on the Old Town of Dubrovnik.<sup>89</sup>

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<sup>78</sup> Exhibit P27.

<sup>79</sup> Exhibit P28, para 2; Nikola Samardžić, T 995-997.

<sup>80</sup> Nikola Samardžić, T 983-984.

<sup>81</sup> Captain Negodić, T 5155.

<sup>82</sup> Mato Valjalo, T 1998-1999; see also Captain Negodić, T 5155.

<sup>83</sup> Mato Valjalo, T 2053; T 2082.

<sup>84</sup> Nikola Jović, T 2920-2921.

<sup>85</sup> Nikola Jović, T 2923.

<sup>86</sup> Captain Drljan, T 7686-7687.

<sup>87</sup> Captain Drljan, T 7687-7689; Exhibit D105.

<sup>88</sup> Exhibit P121; Admiral Jokić, T 3955-3958.

<sup>89</sup> Exhibit P121.

45. Around 15 October, the 3rd company of the 3/472 mtbr took part in combat operations carried out along the Brgat-Bosanka axis.<sup>90</sup> Combat operations were also taking place between the 3/472 mtbr located in Ivanica and Croatian forces on Brgat.<sup>91</sup> The JNA troops were fired upon by the Croatian forces from the village of Gornji Brgat, Donji Brgat and Matrinovići.<sup>92</sup>

46. On 23 and 24 October 1991, the 3/472 mtbr and 4/472 mtbr defeated the Croatian forces along the road from Trebinje to Dubrovnik.<sup>93</sup> On 24 October the 9 VPS took Kupari and the area of Župa Dubrovačka.<sup>94</sup> On 24 or 25 October 1991, the infantry of the 3<sup>rd</sup> Battalion of the 5<sup>th</sup> Motorised Brigade (3/5 mtbr) took control of Dubac.<sup>95</sup> On 25 October 1991, the 4/472 mtbr advanced to the edge of the city of Dubrovnik and took control of Žarkovica. The taking of Žarkovica ensured for the JNA a perfect combat position overlooking the town.<sup>96</sup>

47. On 24 October 1991, the Accused issued a "Decision for further actions" addressed to all units directly subordinated to the 2 OG.<sup>97</sup> The decision indicated that the 9 VPS and the 472 mtbr had advanced to the crossroads between the villages Dubac and Cubag, Čelebić and Zagrada, Bučići and Grbovce, and Matrinovići and Makos and were ready for further action in the direction of Dubac, Bosanka, Gornji Brgat and Podgaj.<sup>98</sup> The decision further informed the units of the planned future activities and gave specific tasks to each unit.

#### **E. Shelling of Dubrovnik in October 1991**

48. During the combat operations in Dubrovnik municipality on 1 October 1991 the town of Dubrovnik was shelled.<sup>99</sup> Many people sought shelter in the hotels of Dubrovnik, the monasteries of the Old Town, and the Rupe Museum.<sup>100</sup> There were air raids on the town. They were not frequent but their intensity increased in the course of shelling.<sup>101</sup> JNA jets were flying over the Old Town at a low altitude but did not target the Old Town.<sup>102</sup> The transmitter in Rijeka Dubrovačka

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<sup>90</sup> Lieutenant-Colonel Stojanović, T 7795-7797.

<sup>91</sup> Witness B, T 5048; Captain Nešić, T 8153.

<sup>92</sup> Lieutenant Lemal, T 7340. However, according to Lieutenant Lemal, this operation was a reconnoitring operation, rather an operation designed to capture territory, T 7395.

<sup>93</sup> Admiral Jokić, T 4452-4455.

<sup>94</sup> Admiral Jokić, T 4452-4455.

<sup>95</sup> Admiral Jokić, T 4456.

<sup>96</sup> Admiral Jokić, T 3445-3447; Captain Negodić, T 5252-5253. *See also* Exhibit C1/2.

<sup>97</sup> Exhibit P119.

<sup>98</sup> Exhibit P119, item 2.

<sup>99</sup> Slavko Grubišić, T 1026-1027; Lucijana Peko, T 1842; Zineta Oresta, T 3462-3463; *see also* Slobodan Vuković, who cannot remember exactly whether it was the last day of September or the first day of October 1991, T 5819-5820.

<sup>100</sup> Đelo Jusić, T 3057-3058.

<sup>101</sup> Slobodan Vuković, T 5819-5820.

<sup>102</sup> Slobodan Vuković, T 5819-2580; *see also* Lucijana Peko, to the effect that that the attack seemed to be mainly carried out by planes, T 1842.

was hit, leaving Dubrovnik without any power or water supplies.<sup>103</sup> That remained the position until after 6 December 1991. Many people panicked and started to store supplies.<sup>104</sup>

49. On 5 October 1991, the city of Dubrovnik was shelled again.<sup>105</sup> The shelling commenced around 0300 or 0400 hrs.<sup>106</sup> According to Lars Brolund the shelling seemed to come from the sea.<sup>107</sup> However, at least one person, Milan Milišić, was killed in the course of the attacks by a 120mm mortar shell, a land warfare weapon.<sup>108</sup>

50. On 23 -24 October 1991, the Old Town was shelled for the first time.<sup>109</sup> The JNA artillery fire was directed at the Old Town, Lapad, Gruž, and Ploče.<sup>110</sup> The shelling began around noon<sup>111</sup> and lasted for about an hour.<sup>112</sup> Until then the inhabitants had thought that they were safe in the Old Town as it had UNESCO status.<sup>113</sup> The shelling caused damage to several buildings in the Old Town.<sup>114</sup>

#### **F. October negotiations and ceasefire**

51. Throughout the October combat operations, negotiations between the parties and international negotiators took place. On 22 October 1991, the Dutch Ambassador to Yugoslavia, Johannes H W. Fietelaars met with Admiral Brovet<sup>115</sup> at the Yugoslav Defence Ministry to express his concern about the shelling of Dubrovnik. During the meeting, Admiral Brovet assured Ambassador Fietelaars that Dubrovnik would be spared as the JNA had already achieved its objectives in the region.

52. On 26 October 1991, the JNA sent a text to both the EC mission and the representatives of the town of Dubrovnik entitled: "The recommendations for the Normalization of Life in Dubrovnik and the ensuring the safety of the city of Dubrovnik". The text contained 11 points which were to be implemented by 2000 hours on 27 October 1991. These points included: the demilitarization of

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<sup>103</sup> Lucijana Peko, T 1842; Đelo Jusić, T 1359-1360.

<sup>104</sup> Đelo Jusić, T 1360.

<sup>105</sup> Lars Brolund, T 847.

<sup>106</sup> Slavko Grubišić, T 1080.

<sup>107</sup> Lars Brolund, T 847.

<sup>108</sup> Lucijana Peko, T 1843.

<sup>109</sup> Ivo Grbić, T 1347-1348; Ivan Mustac, T 1461.

<sup>110</sup> Captain Negodić, T 5164.

<sup>111</sup> Ivan Mustac, T 1461-1462.

<sup>112</sup> Lucijana Peko, T 1845-1846.

<sup>113</sup> Đelo Jusić, T 1358-1359; Lucijana Peko, T 1843-1844

<sup>114</sup> The shelling caused damage to: (a) the atrium of the Sponza Palace (Ivan Mustac, T 1462); (b) the roof of the Rupe museum (Lucijana Peko, T 1847; Ivo Grbić, T 1349-1350); and buildings on both sides of the Boskovica Street (Lucijana Peko, T 1848-1849; Ivo Grbić, T 1349-1350); see also Đelo Jusić, confirming damage in respect to one building in the street, T 1358-1359. There may have been damage to other buildings. See *infra*, paras 318-319.

<sup>115</sup> Admiral Brovet was Deputy Federal Secretary of National Defence (*i.e.*, Deputy Minister of Defence); Admiral Jokić, T 3869-3870.

Dubrovnik by the JNA and the ECMM; the departure from Dubrovnik of foreign mercenaries and Croatian forces (*i.e.* ZNG and Dubrovnik MUP) who were not residents of Dubrovnik; and the removal of party symbols from public places in Dubrovnik. The text guaranteed *inter alia*, that the JNA would not enter Dubrovnik and that it would respect a complete ceasefire on Dubrovnik.<sup>116</sup> On the same date a temporary ceasefire came into force which endured until 8 November 1991. During the ceasefire<sup>117</sup>, although despite it, there was a lot of provocative military action by both sides.<sup>118</sup> Strong artillery fire was used on both sides causing the death of combatants from the opposing sides.<sup>119</sup>

53. According to witness Per Hvalkof, on 28 October 1991, Ambassador Bondioli<sup>120</sup> of the ECMM met the Accused and General Vuković at Milejina in Montenegro. Admiral Jokić also attended the meeting. The two Generals assured the ECMM that the ceasefire would be respected and that the ECMM would have freedom of movement.<sup>121</sup> On the same day, the Accused sent a message to Brussels clarifying that the “11 points plan” of 26 October 1991 was not an ultimatum to Dubrovnik.<sup>122</sup> Ambassador Bondioli referred to Admiral Jokić as the “hardliner” and the Accused as just a “military man” as he did not really participate in any discussions and appeared as if he was merely following orders.<sup>123</sup>

54. On 29 October 1991, a delegation of Ambassadors from Italy, Greece, the UK, The Netherlands and the USA met with Admiral Jokić in Tivat. Admiral Jokić suggested to the delegation that the combat operations carried out by the JNA on Dubrovnik were carried out in response to provocations of the Croatian forces.<sup>124</sup> On the same day the delegation met with Croatian officials and the Head of the ECMM to see the damage caused by the attacks on Dubrovnik.<sup>125</sup> The delegation then returned to Tivat for further discussions with Admiral Jokić. Admiral Jokić assured them that the JNA had achieved its territorial objectives in the region and

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<sup>116</sup> The 11 points were tendered into evidence by the Prosecution and the Defence and were admitted into evidence as Exhibits P123 and D52 respectively. The Defence in its Final Brief contests the authenticity of Exhibit P123 and emphasizes that the document is a communication between the VPS Boka command and the Dubrovnik Crisis Staff and not a document sent by the Accused to the Dubrovnik Crisis Staff, Defence Final Brief, paras 209-210.

<sup>117</sup> Admiral Jokić, T 4622-4623.

<sup>118</sup> Admiral Jokić, T 4624.

<sup>119</sup> Admiral Jokić, T 4624.

<sup>120</sup> Ambassador Bondioli was the head of the regional centre of the ECMM for the region of Dalmatia, Ambassador Fietelaars, T 4265-4266.

<sup>121</sup> Per Hvalkof, T 2138.

<sup>122</sup> Per Hvalkof, T 2258.

<sup>123</sup> Ambassador Fietelaars, T 4265-4266.

<sup>124</sup> Ambassador Fietelaars, T 4171-4175.

<sup>125</sup> Ambassador Fietelaars, T 4176.

that the only remaining objective for the JNA in the region was the disarmament of the Croatian forces.<sup>126</sup> Admiral Jokić further guaranteed that Dubrovnik would not be destroyed.<sup>127</sup>

55. On 1 November 1991, a number of EC Ambassadors attended a meeting with Admiral Brovet in Belgrade. The meeting was held to express EC concern on the siege on Dubrovnik. According to Ambassador Fietelaars, Admiral Brovet appeared insensitive to the EC apprehension concerning the civilian population of Dubrovnik during the siege.<sup>128</sup> Admiral Brovet explained that the JNA could not withdraw until a political solution was reached.<sup>129</sup>

#### **G. Combat operations around Dubrovnik in early November 1991**

56. Despite what had been said to the delegation of Ambassadors at the end of October, in November 1991 JNA forces continued to advance in the direction of Dubrovnik. In November 1991 the JNA activities were focused in the area of Dubac, Brgat, Gornji Brgat, Donji Brgat and Žarkovica.<sup>130</sup>

57. Around 7-10 November 1991 Captain Nešić's anti-armour company of the 3/472 mtbr was ordered to engage in combat operations for taking the village of Bosanka and the surrounding elevations.<sup>131</sup> The 107 Coastal Artillery Group (107 OAG) also took part in combat operations to take control of the village of Bosanka. These lasted at least a couple of days, during which time the JNA forces were fired upon from the region of Strinčijera and sustained casualties.<sup>132</sup> The Herzeg-Novi TO also participated in this operation and incurred losses on 8 November 1991,<sup>133</sup> as well as Lieutenant Pešić's first platoon of the 3<sup>rd</sup> company of the 3/472 mtbr.<sup>134</sup>

58. On 9 November 1991 the command of the 9 VPS issued an order for attack to, *inter alia*, the 472 mtbr including the 3/472 mtbr, and the 3/5 mtbr.<sup>135</sup> The order indicated that "the enemy" had "organised the defence of Dubrovnik by grouping the main forces in the wider region of Lapad, Petka, Babin Kuk and Lazaret" as well as "by a system of occupying fortresses, houses and bunkers in the regions: northern edge of ... Bosanka, Srd, Strinčijera, Dubrava forest, Mokošica, Rozat,

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<sup>126</sup> Ambassador Fietelaars, T 4182; T 4253.

<sup>127</sup> Ambassador Fietelaars, T 4257.

<sup>128</sup> Ambassador Fietelaars, T 4187-4188.

<sup>129</sup> Ambassador Fietelaars, T 4186-4190.

<sup>130</sup> The attention of the 9 VPS artillery was Bosanka and Srd, Admiral Jokić, T 4458. See also Exhibit D57 and Exhibit D58.

<sup>131</sup> Captain Nešić, T 8154-8155.

<sup>132</sup> Captain Pepić, T 7475-7477; 7479-7481; Exhibits D101 and D102. See also Captain Nešić, T 8155.

<sup>133</sup> Slobodan Novaković, T 6817-6822.

<sup>134</sup> Lieutenant Pešić, T 7921-7922.

<sup>135</sup> See Exhibit D57. The order is signed by Admiral Jokić. Lieutenant-Colonel Pavičić also testified that around 8 or 9 November Admiral Jokić came to the command post of the 1/472 mtbr and after a meeting with the company commanders of that battalion issued an order for taking over the Mokošica Komolac road and the hamlet of Rožat: Lieutenant-Colonel Pavičić, T 6906-6909.

Komolac, Luncijata.”<sup>136</sup> The order provided that the units were to respond by seeking to “gain control over the wider region of Dubrava and Rijeka Dubrovačka, break out at the line Žarkovica – Srd – Strinčijera – Gradci – Komolac – Rijeka Dubrovačka and establish full blockade of Dubrovnik from land and sea and force enemy to surrender.” The aforementioned units were tasked to achieve this objective as follows:

With the forces of the 1/472<sup>nd</sup> mtbr and 2/472<sup>nd</sup> mtbr support the attack of the 3/5 pmnbr. With the forces of the 3/472<sup>nd</sup> mtbr, in cooperation with the MO TO, 16 gmo<sup>137</sup> and other forces of the 9<sup>th</sup> VPS execute attack from the regions of: s Bosanka – Kapela – Ivanica in the direction of: s Bosanka – Mulin do (k.334)– Strinčijera (k.412) and until 1600 hours break out in the lines: Srd (tt403) – Strinčijera (k.412) – Gradci (k.353) with the goal of breaking the enemy forces in the wider region of Srd – Dubrava. Upon breaking out on the ordered lines, establish control in the lines: Žarkovica (tt 315) – Srd (tt 403) – Strinčijera (tt 412) – Gradci (k.353) and establish complete blockade from Dubrovnik land and Gruž and from the southern side of Rijeka Dubrovačka.<sup>138</sup>

Until 0500 hours, bring unit to the region of combat operations, organize communications and execute all necessary preparations for attack.

Readiness: 0600 hours 10.11.1991

59. In further pursuit of the order of attack of 9 November 1991, on 11 November 1991 the command of the 9 VPS issued a combat order assigning specific tasks for the day to the units under its command; this order was brought to the attention of the command of the 2 OG.<sup>139</sup> The order, *inter alia*, instructed the 472 mtbr to continue the attack on Rožat-Prijevor-Dračevo village axis and to shell the Srd facility and the Komolac sector.<sup>140</sup> The 3/472 mtbr was directed to focus the attack on the Gružka Glava-Srd axis,<sup>141</sup> and the 3/5 mtbr to continue the blockade of the Nova and Stara Mokošica settlement, and, with 120mm mortars, to support the attack of the 3/472 mtbr, carrying out strikes on the broader Luncijata sector and preventing troop reinforcement from Luncijata to Srd.<sup>142</sup>

60. The attack ordered on 9 November 1991 was a significant offensive effectively to secure for the JNA all the hinterland of the city of Dubrovnik so that it would control the ridge line of the heights above Dubrovnik, including Srd. This attack, which was along an extended front, was pursued with naval and air support and continued until 13 November 1991. It was successful in its objectives, except that the JNA failed to capture Srd despite intensive and prolonged attack by land forces with naval artillery and air support.

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<sup>136</sup> Luncijata and Nuncijata are referring to the same place and are therefore used without distinction in this decision.

<sup>137</sup> The 16.gmo is the Border Patrol Detachment, Boka, a unit of the 9 VPS.

<sup>138</sup> References in the text to “k” and “tt” are map references indicating the elevation points in meters of the specific sites quoted.

<sup>139</sup> Exhibit P118.

<sup>140</sup> Exhibit P118, item 1.

<sup>141</sup> Exhibit P118, item 1.

<sup>142</sup> Exhibit P118, item 2.

## **H. The shelling of the Old Town in November 1991**

61. By early November 1991 several orders issued by the JNA prohibited attacks on the Old Town of Dubrovnik, such as an order from the General Staff of the JNA forbidding attacks on cultural property dated 14 October 1991,<sup>143</sup> an order of the Accused in his “Decision for further actions” dated 24 October 1991, which strictly prohibited attacks on the City of Dubrovnik<sup>144</sup> and the abovementioned order of 11 November 1991 of Admiral Jokić, which contained an explicit prohibition of attacks on the Old Town of Dubrovnik.<sup>145</sup> The latter order explicitly prohibited units from opening fire on the Old Town, except in cases of lethal fire coming from the Old Town.<sup>146</sup> Commanders could order troops to return fire only in an extreme situation, if they had come under fire that inflicted heavy losses.<sup>147</sup>

62. Despite these orders, on 9, 10, 11, and 12 November 1991, in the context of the JNA operations ordered on 9 November, Dubrovnik, including the Old Town, was shelled. The fact that Dubrovnik, especially the Old Town, was again shelled in this November period has been clearly established.<sup>148</sup> In determining the location, duration and intensity of the shelling in November, the Chamber has had, *inter alia*, recourse to the evidence of Paul Davies, a British journalist and the reports of ECMM monitors, admitted through Per Hvalkof. The Chamber finds that a period of concentrated shelling of Dubrovnik commenced on 9 November 1991 and effectively ended on 12 November 1991, although there were individual incidents that occurred on 13 November. On 9 November in a protest letter to the Accused, Per Hvalkof, then head of Regional Centre of the ECMM in Split reports as follows: “Our monitor teams in Dubrovnik have this morning reported shelling in Dubrovnik by JNA forces on land and sea, starting before 0900 hours. I strongly protest against this serious breach of the ceasefire, which I request be restored immediately.”<sup>149</sup> On Paul Davies’s evidence the shelling also started on 9 November 1991.<sup>150</sup> It continued on 10 November,<sup>151</sup> at which point the Old Town itself first came under attack. An ECMM report from that day records “heavy shelling” from land (Žarkovica) and sea.<sup>152</sup> In particular, it notes the launching of “several mortars shelling, gun fire as well as at least 5 anti-tanks rockets against the

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<sup>143</sup> Exhibit P116.

<sup>144</sup> Exhibit P119, item 3.

<sup>145</sup> Exhibit P118.

<sup>146</sup> Exhibit P118, Admiral Jokić, T 3925. Another order, issued by the Accused as the commander of the 2 OG to the 9 VPS, on 18 November 1991, after the combat operations of 8 to 13 November 1991, also required the units not to open fire on the Old Town of Dubrovnik and to retreat the units exposed to enemy fire to cover: Exhibit D47, item 4.

<sup>147</sup> Admiral Jokić, T 3922-3925.

<sup>148</sup> Ivo Grbic, T 1352-1354; Ivo Vlašica, T 3320; T 3326; Lucijano Peko, T 1847-1848; Captain Negodić, T 5257-5262.

<sup>149</sup> Exhibit P61, tab 10. *See also* Exhibit P61, tab 23, p 5.

<sup>150</sup> Paul Davies, T 577.

<sup>151</sup> *See inter alia*, a protest letter from Per Hvalkof dated 10 November 1991 reporting continuing heavy shelling of Dubrovnik by JNA.

Old city walls and the Old port. Some shellings, as reported, touched the Old inner city.”<sup>153</sup> That same day, Paul Davies and his team, while investigating reports that the Old Town had been hit, heard what they believed to be mortars hitting the Old Town. They were told that there had been three others before.<sup>154</sup> They were shown the damage to the Franciscan complex in the Old Town, including the monastery and the convent.<sup>155</sup>

63. On 11 November 1991 the attack on Dubrovnik intensified.<sup>156</sup> In the context of a much broader attack on Dubrovnik, a lot of shells were falling very close to the Old Town, as well as within the Old Town itself.<sup>157</sup> Paul Davies and his team were filming the shelling on 11 November 1991. On his evidence, the shelling was so heavy that day that he and his team were able to recognise a pattern of noise, followed by the trajectory of the shell and the point of impact.<sup>158</sup> An ECMM monitor stated in his report on 11 November that on that evening he could see the old port on fire, as well as part of the city beyond the walls.<sup>159</sup>

64. The shelling continued on 12 November. The ECMM monitors reported sporadic shelling in the morning, which escalated in the afternoon. They also recorded a “continuation of the burning fire in the city”, although it is not clear if this refers to the Old Town.<sup>160</sup> It was the evidence of Paul Davies that the attack that day, unlike the previous days of shelling, was concentrated on the Old Town.<sup>161</sup> He characterised the attack on the Old Town that day as “deliberate” and “sustained”.<sup>162</sup> He and his team filmed between 15 and 17 impacts of wire-guided missiles, although he testified that the total number of such missiles used on 12 November 1991 against the Old Town was probably somewhere between 30 and 100.<sup>163</sup> The wire-guided missiles hit the walls of the Old Town, the boats moored in the sheltered area in the port of the Old Town, as well as hitting locations within the Old Town.<sup>164</sup> The evidence establishes that the shelling of the Old Town on 12 November was intense.<sup>165</sup>

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<sup>152</sup> Exhibit P61, tab 22.

<sup>153</sup> Exhibit P61, tab 22 (emphasis omitted).

<sup>154</sup> Paul Davies, T 588.

<sup>155</sup> Paul Davies, T 588. According to Captain Negodić the shelling caused damage to 45 places of worship, T 5259. Ivo Grbić gave evidence that the Lovrijenac fort and private boats in the harbour were also damaged by the attack, T 1352-1354; T 1454. There may have been damage to other buildings. *See infra*, paras 318-319.

<sup>156</sup> Paul Davies, T 589; T 3600.

<sup>157</sup> Paul Davies, T 589.

<sup>158</sup> Paul Davies, T 591.

<sup>159</sup> Exhibit P61, tab 22.

<sup>160</sup> Exhibit P61, tab 22.

<sup>161</sup> Paul Davies, T 597-598.

<sup>162</sup> Paul Davies, T 597.

<sup>163</sup> Paul Davies, T 599.

<sup>164</sup> Paul Davies, T 600.

<sup>165</sup> Paul Davies indicated that he and his team had counted 1000 incoming explosions that day, after which they stopped recording them. Paul Davies, T 607.

65. On 13 November 1991, the ECMM monitors reported only “sporadic shooting in the morning” with the situation quietening down as from 1200 hours.<sup>166</sup> Paul Davies testified that he was able to visit the Old Town briefly on that day and see the damage. His evidence was that there had been:

[a] lot of damage, shell impacts. You could still see some of the missiles that hadn't exploded stuck in the walls of the Old Town, stuck in the areas of the harbour where they had fallen. You could see the damage from those that had exploded, both on the walls and on the roadways where they had landed and where they had landed on buildings causing damage and fires, where they had landed on cars that had been set on fire and destroyed. And most of the boats that had been moored in that little harbour in front of the Old Town had been set on fire and sunk.<sup>167</sup>

66. The evidence indicates that in November 1991, JNA warships, aircraft and artillery attacked Dubrovnik.<sup>168</sup> There is no indication of infantry involvement. The JNA artillery was firing from various places, including Žarkovica.<sup>169</sup> Paul Davies testified he could see “the barrels of artillery pieces on top of Žarkovica.”<sup>170</sup> He stated that “at times of shelling, you could film those and see them recoil and the puff of smoke that came from them as they were firing. And then a few seconds later there would be an explosion in Dubrovnik.”<sup>171</sup> It was Paul Davies’s assessment that the JNA attack on Dubrovnik in early November 1991 was a coordinated attack involving land (i.e. artillery) sea and air forces.<sup>172</sup>

67. Wire-guided missiles were used by the JNA. Based on his view of the damage to the Old Town on 13 November 1991, Paul Davies concluded that the firing came from the south of Dubrovnik.<sup>173</sup> This was the side from which he had witnessed missiles being fired over the water towards the Old Town.<sup>174</sup> Captain Nešić, whose battalion was stationed at Žarkovica,<sup>175</sup> which is only approximately 2300 metres to the south of the Old Town, confirmed that the Old Town was shelled between 10 and at least 12 November 1991 by wire-guided “Maljutkas” missiles or rockets. It was his evidence that his unit was targeting Croatian firing positions over this period,<sup>176</sup> although

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<sup>166</sup> Exhibit P61, tab 22.

<sup>167</sup> Paul Davies, T 606.

<sup>168</sup> Paul Davies, T 594-595, T 607. According to Admiral Jokić, at the time of the attack the 9 VPS constituted of the 16<sup>th</sup> Border Detachment, the 69<sup>th</sup> missile base, the PBO division of the 337<sup>th</sup> Naval Rear Base, the 107 OAG, two mobile artillery battalions of 85 millimetres and 130 millimetres, and staff units. The 2 OG mainly comprised of land forces and some naval units within the 9 VPS; it did not have an own air-force unit, but according to Admiral Jokić “it did have the support of the 97<sup>th</sup> Air Force Brigade.” Admiral Jokić further pointed out that “parts of this brigade did act on orders of the commander of the 2 OG”: Admiral Jokić, T 4397-98, T 3823.

<sup>169</sup> Paul Davies, T 594; T 607; Ivo Vlašica testified that he observed JNA forces on Žarkovica in November 1991, T 3317. *See Annex III.E.*

<sup>170</sup> Paul Davies, T 583.

<sup>171</sup> Paul Davies, T 583.

<sup>172</sup> Paul Davies, T 594-595.

<sup>173</sup> Paul Davies, T 607.

<sup>174</sup> Paul Davies, T 593 ; T 600 ; T 3565-3566.

<sup>175</sup> Captain Nešić, T 8158.

<sup>176</sup> Captain Nešić, T 8203. He testified that the quantity of ammunition used during this period and the objectives targeted were topics he discussed with his battalion commander.

there is clear reason for reservation about this, as there is with other aspects of his evidence as discussed later. According to Captain Nešić, Croatian forces were firing at the battalion in Žarkovica from the Old Town; he said Croatian forces were firing mortars from a machine gun post in the harbour and from the Pile gate.<sup>177</sup>

68. There was a serious imbalance of arms and weapons between the parties to the conflict throughout October-December 1991. The Croatian forces were far outnumbered, in particular their artillery, during this period.<sup>178</sup> The JNA had heavy and light artillery, tanks, aircraft, and warships. The Croatian forces did not have aircraft or warships<sup>179</sup> and had only small weapons, rifles, pistols and a small collection of other weaponry that was not particularly effective. This weaponry included mobile units known as “Charlies” (*i.e.* vehicles with mounted mortars or small calibre canons).<sup>180</sup> The mobile units permitted the Croatian forces to move quickly to different locations and to get closer to the objectives targeted.<sup>181</sup> The Chamber notes that in this judgement it does not have regard to issues, which occupied some time in the evidence, whether rockets and smaller calibre mortars should be regarded as artillery or infantry weapons; similarly some types of heavier machine guns. “Artillery” will often be used in this decision as including such weapons.

69. The Croatian forces were also short of ammunition due to the JNA land and sea blockade of Dubrovnik. Their only source of re-supply was by night, when some ammunition was shipped in on speedboats that managed to get through the sea blockade.<sup>182</sup> As Paul Davies was told by the Croatian forces on Srd, due to the imbalance of arms and weapons of the opposing sides, the Croatian forces could not take initiatives to attack and only responded to attacks from the JNA forces.<sup>183</sup> Significantly, it was the evidence of Admiral Jokić that the town of Dubrovnik was “not sufficiently armed to pose any real danger to the [JNA] forces” in the area.<sup>184</sup>

70. It is also the case that, with the singular exception of Srd, the JNA occupied all the high ground. This aided its artillery and disadvantaged in range the Croatian weaponry. Paul Davies recalls that on a number of occasions the Croatian forces attempted to shell JNA artillery positions but without success. However, on one occasion, the Croatian forces managed to land a shell on the top of Žarkovica.<sup>185</sup> Paul Davies filmed the impact of the explosion on Žarkovica. After the

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<sup>177</sup> Captain Nešić, T 8157-8158. Exhibit D19 is a map indicating the Croatian fire points as marked by Captain Nešić.

<sup>178</sup> Captain Negodić, T 5355.

<sup>179</sup> Paul Davies, T 595.

<sup>180</sup> Paul Davies, T 583-585; T 601; T 3561; T 3567-3568.

<sup>181</sup> Paul Davies, T 601 ; T 3555-3556.

<sup>182</sup> Paul Davies, T 585-586.

<sup>183</sup> Paul Davies, T 585-586.

<sup>184</sup> Admiral Jokić, T 3974.

<sup>185</sup> Paul Davies, T 601 ; T 3590-3592.

detonation, Paul Davies filmed five people on the walls of the Old Town, two of whom wore uniforms and carried weapons.<sup>186</sup>

71. As for the Croatian defensive positions in November 1991, it has been established that they were both stationary and mobile. According to Captain Negodić who had command of the Croatian artillery, there were fixed mortar positions in the city of Dubrovnik, although none were in the Old Town. There were positions, for example, close to the SDK building to the north west of the Old Town, in the Bogišića Park to the west, and in the area called Lazareti immediately to the east of the Old Town, as well as in Lapad and Solitudo further to the west. These locations were chosen as they were sheltered from the view of the JNA.<sup>187</sup> Croatian forces were also positioned on Srd,<sup>188</sup> and were operating near the port of Gruž.<sup>189</sup> They also had a position close to the Belvedere Hotel<sup>190</sup> and the Argentina Hotel,<sup>191</sup> as these were in the vicinity of the JNA positions on Žarkovica.<sup>192</sup> Croatian forces also used the above-mentioned mobile mortar units.<sup>193</sup> The Croatian tactic was to get close to the target with a mobile mortar unit, fire and move away to avoid JNA return fire.<sup>194</sup> Mobile mortar units were moved in and around the newer parts of Dubrovnik accordingly.<sup>195</sup>

72. No Croatian artillery was positioned in the Old Town of Dubrovnik in November 1991.<sup>196</sup> However, there were JNA reports of shooting incidents from the Old Town walls and turrets in the beginning of November. These reports do not, however, indicate that the Croatian forces were positioned on the Old Town walls and turrets throughout the rest of November.<sup>197</sup> A number of witnesses testified that there was no outgoing fire from the Old Town in November.<sup>198</sup> Individuals armed with light weapons, such as pistols, could be observed moving around the Old Town but there were no set defence positions.<sup>199</sup>

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<sup>186</sup> Paul Davies, T 3563.

<sup>187</sup> Captain Negodić, T 5342-5344.

<sup>188</sup> Paul Davies, T 583-586.

<sup>189</sup> Paul Davies, T 3588-3589.

<sup>190</sup> Paul Davies, T 3598.

<sup>191</sup> Paul Davies, T 3555-3556.

<sup>192</sup> Paul Davies, T 603.

<sup>193</sup> Paul Davies, T 3590-3592; T 3555-3556.

<sup>194</sup> Paul Davies, T 629-630; T 3555-3556. See also Slobodan Novaković, T 6872.

<sup>195</sup> Lieutenant-Colonel Pavićić, T 6900-6901; Lieutenant Lemal, T 7356 ; Paul Davies, T 3569-3570.

<sup>196</sup> Paul Davies, T 627-628.

<sup>197</sup> Admiral Jokić, T 4963-4973.

<sup>198</sup> Paul Davies, T 603; Captain Negodić, T 5260-5261.

<sup>199</sup> Paul Davies, T 3601.

## **I. November negotiations and ceasefire**

73. Following the November attack and the repeated shelling of Dubrovnik another ceasefire came into force on 13 November 1991.<sup>200</sup> Yet, the ceasefire was not complied with by either side. There was ongoing disputation as to which side provoked each violation. To a degree that disputation was ventilated in evidence, but not to an extent which enables any decision to be made. There are reports in JNA records of Croatian violations and protests by both sides against violations by the other.<sup>201</sup> The Chamber will return to this issue in respect of events of 5 and 6 December 1991.

74. In this context the Chamber notes yet another order, this time issued by the Accused as commander of 2 OG to the 9 VPS, on 18 November 1991. This order required those units not to open fire on the Old Town of Dubrovnik and to retreat units exposed to enemy fire to cover.<sup>202</sup> This order is significant in timing because of negotiations for a resolution of the position on Dubrovnik then getting under way.

75. With a view to reaching an agreement on a permanent ceasefire, from mid-November until the beginning of December 1991, negotiations resumed between the JNA, the Croatian Government, the Dubrovnik Crisis Staff and the ECMM.<sup>203</sup> The evidence indicates that the principal negotiators for the JNA were Admiral Jokić<sup>204</sup> and Colonel Svičević<sup>205</sup> a staff officer of the 2 OG. One of the main negotiators for the Croatian government was Minister Davorin Rudolf, Minister for Maritime Affairs of the Croatian government.<sup>206</sup>

76. Following the shellings of Dubrovnik in November 1991, the ECMM monitors had withdrawn from Dubrovnik for safety reasons.<sup>207</sup> On 19 November 1991, Minister Bernard Kouchner, the French Minister of Culture, Colonel Svičević and representatives of Dubrovnik, signed another agreement providing for, *inter alia* the mutual withdrawal of armed forces from Dubrovnik and the surrender of weapons.<sup>208</sup> On 23 November 1991 a further agreement was signed in Geneva, calling for an unconditional ceasefire and the withdrawal of JNA forces from

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<sup>200</sup> Admiral Jokić, T 4803; *see* more generally Captain Nešić, to the effect that from November as of 5 December a ceasefire was in force, T 8217.

<sup>201</sup> Lieutenant-Colonel Stojanović, T 7804; *see also* Captain Nešić, specifying that the provocations from the Croatian forces, using small arms with silencers, occurred on a daily basis, T 8163; Lieutenant Lemal, T 7359.

<sup>202</sup> Exhibit D47, item 4.

<sup>203</sup> Exhibits P61 and D90.

<sup>204</sup> Exhibit P61, tab 26.

<sup>205</sup> Colonel Svičević, T 7064-7065. *See also* Per Hvalhof, T 2180.

<sup>206</sup> Minister Rudolf, T 5476-5477.

<sup>207</sup> Paul Davies, T 608.

<sup>208</sup> Per Hvalhof, T 2178; Colonel Svičević further testified that Minister Kouchner also participated in other negotiations in November and December 1991, T 7072-7074.

Dubrovnik. Among the signatories were Franjo Tuđman, Slobodan Milošević, General Kadijević and Cyrus Vance.<sup>209</sup>

77. On 25 November 1991, a “Memorandum of Agreement” was reached. The JNA side was represented by the naval and military commanders of the JNA in the Dubrovnik area: Admiral Jokić and General Damjanović.<sup>210</sup> The Croatian side was represented by the mayor of Dubrovnik and other officials. Minister Kouchner also attended the meeting. The agreement *inter alia* protected the return of the ECMM to Dubrovnik.<sup>211</sup>

78. On 28 November 1991, the Croatian Prime Minister, Mr Gregurić, mandated Minister Rudolf together with two other ministers to represent the Croatian government in further negotiations pertaining to Dubrovnik. The main objectives of the negotiations were the cessation of hostilities and the withdrawal of the JNA from Split. The JNA guaranteed that there would be no combat actions during the negotiations.<sup>212</sup> After visiting Split, on 4 December 1991, Minister Rudolf and the two other ministers arrived by ship in Dubrovnik to meet with two representatives of the town: Mr Poljanić, the mayor of Dubrovnik, and Mr Zikić, the president of the Executive Council of Dubrovnik.<sup>213</sup> The ECMM monitors were also present.<sup>214</sup> On the same day, Minister Rudolf contacted the JNA liaison officer Captain Jeremić and agreed to start negotiations on the next day, 5 December 1991, in Cavtat.<sup>215</sup>

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<sup>209</sup> Geneva Accord, 23 November 1991 (UN Doc. S/23239, Annex).

<sup>210</sup> Per Hvalkof, T 2182.

<sup>211</sup> Per Hvalkof, T 2182; Exhibit P61, tab 28.

<sup>212</sup> Minister Rudolf, T 5485-5486.

<sup>213</sup> Minister Rudolf, T 5746 ; Adrien Paul Stringer, T 415.

<sup>214</sup> Minister Rudolf, T 5746.

<sup>215</sup> Minister Rudolf, T 5491-5492.

## IV. THE ATTACK ON 6 DECEMBER 1991

### A. The planning of the attack – events before 6 December 1991

79. On 3 December 1991, the Accused, as commander of the 2 OG, attended a top level meeting at the General Staff in Belgrade with senior officers of the JNA.<sup>216</sup> This was a time for significant strategy decisions by the JNA and the government in Belgrade. As is noted briefly elsewhere in these reasons, events of political and military significance for them were happening, both within the territory of the former Yugoslavia and elsewhere.<sup>217</sup> The blockade of Dubrovnik by the JNA had been in place for several weeks during which the JNA had made significant advances on the ground which firmly tightened its grip on Dubrovnik. It should be observed, however, that Dubrovnik was but one of many issues between Belgrade and Zagreb. It would be misleading to think that Dubrovnik was an issue to be considered in isolation in either capital or by the JNA. In particular, still not implemented, was the agreement signed in Geneva at the highest Croatian and Serbian levels for an unconditional ceasefire and the withdrawal from Croatia of JNA forces.<sup>218</sup>

80. The Croatian ministerial committee, led by Minister Rudolf, which arrived in Dubrovnik on 4 December 1991, was to negotiate with the JNA in an attempt to resolve the problem of the blockade of Dubrovnik.<sup>219</sup> It appears that on 3 December 1991, in Belgrade, the Accused was given responsibility for conducting negotiations with the Croatian ministers.<sup>220</sup> In the event, however, the Accused delegated that responsibility to his immediate subordinate, Admiral Jokić, the commander of the 9 VPS.<sup>221</sup>

81. So it was that on 5 December 1991, Admiral Jokić attended a meeting with the Croatian ministers to seek to negotiate a settlement. On the Admiral's evidence, much progress was made and by the end of the meeting there was only one issue in the way of a ceasefire agreement, namely whether vessels bringing supplies or people to Dubrovnik should be boarded and inspected by the JNA at sea, as the Admiral proposed, or after berthing as the Croatians proposed.<sup>222</sup> Admiral Jokić testified that he was concerned that JNA sailors would be at risk if they were inspected in the port.<sup>223</sup> On his evidence, at the end of the meeting it was determined that the negotiations should be resumed on the morning of 6 December 1991, and, in anticipation of that one issue being resolved it

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<sup>216</sup> Admiral Jokić, T 4030-4033.

<sup>217</sup> *See supra*, paras 13-18.

<sup>218</sup> Geneva Accord, 23 November 1991 (UN Doc. S/23239. Annex).

<sup>219</sup> Minister Rudolf, T 5491-5492; Per Hvalkof, T 2183.

<sup>220</sup> Admiral Jokić, T 4030-4031.

<sup>221</sup> Admiral Jokić, T 4031-4034; Minister Rudolf, T 5589-5591.

<sup>222</sup> Admiral Jokić, T 4038-4039; Minister Rudolf, T 5596-5597.

<sup>223</sup> Admiral Jokić, T 4038.

was tentatively expected that a ceasefire agreement would be signed<sup>224</sup> and that the ceasefire would come into effect at 1200 hours on 6 December 1991.<sup>225</sup> The other terms as tentatively agreed made no provision for relinquishment of Srd to the JNA.

82. It is the evidence of Admiral Jokić that on 5 December 1991, following the meeting with the Croatian ministers, he reported to the Accused at Trebinje.<sup>226</sup> It is the evidence of Admiral Jokić that the Accused was not concerned about the terms of the proposed ceasefire agreement and regarded the one outstanding issue as one to be determined by the Admiral as it was a naval matter.<sup>227</sup> It is the evidence of Admiral Jokić that the Accused agreed that there should be a ceasefire from 1200 hours on 6 December 1991 in anticipation that final agreement could be reached the next morning with the Croatian ministers.<sup>228</sup> It is the evidence of Admiral Jokić that after this meeting in Trebinje he advised his senior staff of the intended ceasefire at 1200 hours.<sup>229</sup> While there is no evidence contradicting this account by the Admiral, the Defence contends it should not be accepted that there was any contact between the Accused and Admiral Jokić<sup>230</sup> as there is no record of such a communication in any log of the JNA which is in evidence. In this regard, the Chamber does not find it surprising that the Admiral and the Accused might speak directly, without there being a logged record, especially if the Admiral visited the Accused to report personally. On the contrary, the Chamber considers it would be surprising indeed if Admiral Jokić did not make a report to the Accused as to the course of such an important negotiation, which he conducted on behalf of the Accused, especially as a ceasefire was contemplated. The Chamber therefore finds that Admiral Jokić did report to the Accused on 5 December 1991 following the meeting with the Croatian ministers. For a number of reasons, which will be developed in this decision, the Chamber has reservations, however, as to what was discussed when the Admiral made his report.

83. There was no meeting with the Croatian Ministers on 6 December 1991. Initially it was deferred until later in the day and then, principally because the ferry in which the Croatian ministers were to travel to the meeting place was destroyed during the attack on Dubrovnik and because Admiral Jokić was ordered to go to Belgrade in the afternoon of 6 December 1991, it was postponed until 7 December 1991.<sup>231</sup> While it was the effect of Admiral Jokić's evidence that every issue between the JNA and the Croatian side was resolved in the negotiations on 5 December 1991,

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<sup>224</sup> Admiral Jokić, T 4038-4039.

<sup>225</sup> Admiral Jokić, T 4040.

<sup>226</sup> Admiral Jokić, T 4039.

<sup>227</sup> Admiral Jokić, T 4039; 4715.

<sup>228</sup> Admiral Jokić, T 4040.

<sup>229</sup> Admiral Jokić, T 4040.

<sup>230</sup> Defence Final Brief, para 277; Admiral Jokić, T 4859-4863.

<sup>231</sup> Minister Rudolf, T 5559-5561; Exhibit P162.

except for the question whether ships should be inspected at sea by the JNA or after they had berthed in Dubrovnik,<sup>232</sup> that really puts too generous a gloss on the state of the negotiations at their adjournment on 5 December 1991. Minister Rudolf identified two issues which remained outstanding, the inspection of ships and the lifting of the naval blockade.<sup>233</sup> He also stated that at the 5 December 1991 negotiations, Admiral Jokić had proposed a demilitarisation of Dubrovnik in exchange for the lifting of the blockade and the withdrawal of the JNA forces out of shooting range,<sup>234</sup> but agreement on this had not been reached at the time. Some of the issues for negotiation had been settled on 5 December 1991, namely a ceasefire, the reopening of roads and the restoration of daily services.<sup>235</sup> However, the others remained unresolved. On 6 December 1991, Admiral Jokić sent a message to Minister Rudolf in which he proposed to resume the negotiations on 7 December 1991 at 1200 hours and gave an outline of the issues to be incorporated in the agreement.<sup>236</sup> Included were the issues already resolved on 5 December 1991, but Admiral Jokić also conceded that ships could be checked in the port of Gruž in Dubrovnik. The Admiral, however, reiterated his proposal for the blockade of Dubrovnik to be lifted in exchange for the evacuation of the members of the Croatian armed forces in the town.<sup>237</sup>

84. On 7 December 1991, the talks resumed in Cavtat. An agreement was signed.<sup>238</sup> The inspection of the ships in the port of Gruž was included in the agreement.<sup>239</sup> It appears, however, that the lifting of the blockade and the demilitarisation of Dubrovnik were not able to be resolved and a compromise was adopted. The agreement provided for the intention of both parties to “gradually reduce manpower and equipment. In that respect, the parties will mutually agree and inform on the ways and directions of the diminution of armed forces in the town of Dubrovnik and its surroundings.”<sup>240</sup> It is apparent from this that when negotiations were adjourned on 5 December 1991, issues of far reaching policy significance remained unresolved. The Chamber is unable to reconcile this with the evidence of Admiral Jokić that ONLY the issue of the inspection of the ships remained unresolved on 5 December 1991, an issue which the Accused saw to be solely a naval concern which the Accused had left to Admiral Jokić to resolve when the Admiral reported to the Accused on the negotiations late on 5 December 1991.<sup>241</sup>

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<sup>232</sup> Admiral Jokić, T 4038-4039.

<sup>233</sup> Minister Rudolf, T 5752-5753.

<sup>234</sup> Minister Rudolf, T 5592-5595.

<sup>235</sup> Minister Rudolf, T 5753.

<sup>236</sup> Exhibit P162, p 20.

<sup>237</sup> Exhibit P162, p 20, items 4 and 7.

<sup>238</sup> Minister Rudolf, T 5718-5720. *See also* Exhibit P61, tab 38.

<sup>239</sup> Exhibit P61, tab 38, Article 3.

<sup>240</sup> Exhibit P61, tab 38, Article 2.

<sup>241</sup> Admiral Jokić, T 4039.

85. Other material events were occurring on 5 December 1991. Late in the afternoon, a meeting was held at the forward command post of the 9 VPS at Kupari near Žarkovica. The Chamber accepts the evidence that those at the meeting included Warship-Captain Zec who was Chief of Staff to Admiral Jokić, the operational officer of the 9 VPS Captain Kozarić, the assistant commander responsible for moral guidance of the 9 VPS Lieutenant-Colonel Zarković, the commander of the 107 OAG Lieutenant-Colonel Stamenov and the temporary commander of the 3/5 mtbr Lieutenant-Colonel Jovanović. Also present was the commander of the 3/472 mtbr Captain Kovačević, who provided the assault troops for the attack on Srd the following morning.<sup>242</sup> The 3/472 mtbr had its 120mm mortar battery positioned inland from Dubrovnik in the Uškoplje region.<sup>243</sup> Each of its companies also had four 82mm mortars.<sup>244</sup> Those attending the Kupari meeting were all senior 9 VPS staff officers or commanders of 9 VPS units, at that time under the immediate command of Admiral Jokić, and the superior command of the Accused, as the 9 VPS was part of the 2 OG which the Accused commanded.<sup>245</sup>

86. Lieutenant-Colonel Jovanović testified that Admiral Jokić himself attended the meeting and that during the meeting Captain Kovačević outlined problems his troops were experiencing with the Croatian forces occupying Srd and proposed that his troops should take Srd in a quick action the next morning.<sup>246</sup> This was to be accomplished before an anticipated ceasefire at 1200 hours. In a battle plan which Captain Kovačević put forward, heavy artillery support was to be provided by the 107 OAG howitzers at Čilipi, as well as the heavy 120mm mortars of the 3/472 mtbr at Uškoplje and of the 3/5 mtbr at Osojnik.<sup>247</sup>

87. Admiral Jokić emphatically denies he attended that meeting. He gave an account of his movements on the afternoon and evening of 5 December 1991 which did not include being at Kupari for this meeting.<sup>248</sup> It is true, as the Defence submits, that in some respects, the account of his movements given in evidence differs from earlier accounts when interviewed by investigators from the Office of the Prosecution.<sup>249</sup> The Admiral accepts this, explaining that so many years after the event, his recollection was initially faulty and he had to correct his earlier statements after he had had a chance to review records and to discuss the events with others.<sup>250</sup> The Chamber notes that the evidence does not suggest there was any formal record of this meeting, certainly none is

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<sup>242</sup> Lieutenant-Colonel Jovanović, T 8079-8080; 8132.

<sup>243</sup> Admiral Jokić, T 3863-3864; 3980; Exhibit P132.

<sup>244</sup> Admiral Jokić, T 3840; 3980.

<sup>245</sup> See *infra*, paras 384-385.

<sup>246</sup> Lieutenant-Colonel Jovanović, T 8079-8080.

<sup>247</sup> Lieutenant-Colonel Jovanović, T 8079-8081.

<sup>248</sup> Admiral Jokić, T 8564-8572.

<sup>249</sup> Defence Final Brief, paras 302-304.

<sup>250</sup> Admiral Jokić, T 4860-63; 8576.

given in evidence, and apart from Lieutenant-Colonel Jovanović none of the other officers said to be at the meeting were called to give evidence by either the Prosecution or the Defence.

88. Lieutenant-Colonel Jovanović has a significant personal interest in having Admiral Jokić present at the Kupari meeting. Lieutenant-Colonel Jovanović, curiously, was temporarily appointed to command the 3/5 mtbr on 5 December 1991, the actual commander having been granted temporary leave,<sup>251</sup> and was summarily relieved of his temporary command on the evening of 6 December 1991 on the order of Admiral Jokić.<sup>252</sup> It is Lieutenant-Colonel Jovanović's evidence that he was never told the reason for his removal but that he knew it had nothing to do with the shelling of the Old Town.<sup>253</sup> Admiral Jokić testified that he replaced Lieutenant-Colonel Jovanović because he had given artillery support to Captain Kovačević without his approval.<sup>254</sup> In response to this, Lieutenant-Colonel Jovanović contends that Admiral Jokić was present the day before at Kupari when the battle plan was outlined, and although he did not expressly give the authority for the attack, by his presence and apparent acceptance, Admiral Jokić gave him every justification for understanding that the attack was authorised.<sup>255</sup> The issue whether Admiral Jokić was at the Kupari meeting is not determinative of the Chamber's decision in this trial, although it has a relevance to credit. It remains in balance. Irrespective of that issue, the Chamber does find, however, that Warship-Captain Zec, who was the Chief of Staff of Admiral Jokić, and other senior 9 VPS staff officers were present at the meeting and that at the meeting a battle plan to take Srd the following morning was determined, a plan which involved the use of mortars and other artillery, as required, to support the assault on Srd.

89. Notwithstanding this last finding, because of other evidence considered later concerning the Accused's role, the Chamber also records an express reservation concerning the evidence of Lieutenant-Colonel Jovanović that the attack on Srd for the next morning was proposed by Captain Kovačević at the meeting and then agreed to and planned at that meeting by those present. Such an attack would be a major provocation and a glaring breach of the existing ceasefire and was to occur in the very course of negotiations by Admiral Jokić, as the Accused's deputy, for a more soundly based resolution of the Dubrovnik crisis. The very evidence of Lieutenant-Colonel Jovanović reveals that at least the prospect of a new ceasefire at 1200 hours the next day was known at the meeting. Especially given the nature of the command structure of the JNA, it is immediately surprising that such an attack would even be considered, or implemented, on the proposition of a mere battalion commander at the level of authority of those present, whether or not

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<sup>251</sup> Admiral Jokić, T 8551-8552.

<sup>252</sup> Lieutenant-Colonel Jovanović, T 8093-8098; see also, Exhibit D65.

<sup>253</sup> Lieutenant-Colonel Jovanović, T 8097-8098; 8104.

<sup>254</sup> Admiral Jokić, T 8553.

Admiral Jokić was present, and without reference to the commander of the operational force, *i.e* the Accused. The negotiations then being conducted by Admiral Jokić only serve to heighten the improbability of what is suggested.

90. Much later on 5 December, in the evening, the company commanders of the 3/472 mtbr, were contacted by the duty communications officer at the 3/472 mtbr's command post in Gornji Brgat.<sup>256</sup> They were requested to attend a meeting at the command of Captain Jeremić in Ivanica.<sup>257</sup> Shortly after everyone had assembled, Captain Kovačević, the commander of the 3/472 mtbr, arrived.<sup>258</sup> He informed them that the units of the 3/472 mtbr would launch an attack on Srd the following day and began delegating tasks to the various units relating to the operation.<sup>259</sup> The objective, he said, was to take Srd quickly and hold onto the position, so as to be able to exercise control over the surrounding terrain. No other objectives were mentioned.<sup>260</sup> Those who attended the meeting testified that Captain Kovačević had said that the plan to attack Srd had been approved by the superior command.<sup>261</sup> The Chamber notes that this clearly indicates at least the commander of the 9 VPS but could equally indicate the commander of the 2 OG. The company commanders inquired about artillery support for the attack and were told that support would come from the 120mm mortar company located in Uškoplje<sup>262</sup> as well as the units stationed in Čilipi (130mm howitzers) and Lieutenant-Colonel Jovanović's unit, the 3/5 mtbr, based at Osojnik (120mm mortars).<sup>263</sup> Smaller mortars and cannons as well as rockets were company weapons under the command of those present.

91. In the Chamber's view, the content of this discussion is significant. First, it offers clear support for the veracity of the evidence that Captain Kovačević had earlier attended a meeting at Kupari at which the commanders of the Čilipi howitzer battery and of the 3/5 mtbr were present and the battle plan for the taking of Srd the next day was put in place. Secondly, as the Čilipi howitzer battery and the 3/5 mtbr were not under Captain Kovačević's command, the involvement of those units demonstrates that the plan for the attack, and its implementation, involved coordinated planning at a higher level than the 3/472 mtbr. In this case the other units were each subject to the command of the 9 VPS, Admiral Jokić, and, at the next level, of the 2 OG, so the attack plan was consistent with the involvement of those two commands, or, at least, with the involvement of the command of the 9 VPS. Thirdly, it demonstrates the significance of artillery support for an attack

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<sup>255</sup> Exhibit D108.

<sup>256</sup> Captain Nešić, T 8164; Lieutenant-Colonel Stojanović, T 7821; Lieutenant Lemal, T 7366.

<sup>257</sup> Lieutenant-Colonel Stojanović, T 7821; Lieutenant Lemal, T 7366.

<sup>258</sup> Lieutenant Lemal, T 7366; 7458-7459; Captain Nešić, T 8164.

<sup>259</sup> Lieutenant Lemal, T 7368.

<sup>260</sup> Lieutenant-Colonel Stojanović, T 7822-7824; Captain Nešić, T 8165-8166.

<sup>261</sup> Lieutenant-Colonel Stojanović, T 7822; Lieutenant Lemal, T 7367.

<sup>262</sup> Lieutenant-Colonel Stojanović, T 7847-7848.

such as this. The need for it was immediately a concern of those who were to actually lead the ground assault troops, and had been anticipated by those planning the attack at a higher level. The plan provided for the use of quite a formidable artillery capacity. In addition to the smaller 82mm mortars attached to each company of the 3/472 mtbr, there were two 120mm mortar companies, the anti-armour company at Žarkovica with an array of weapons, including recoilless cannons and Maljutka rockets, ZIS cannons and the heavy 130mm howitzer cannons at Čilipi. With limited exceptions, all of these had the capacity to fire at the wider Dubrovnik including Srd and the Old Town. The exceptions were that the 120mm mortars of the 3/5 mtbr at Osojnik could not quite reach the Old Town, and the 120mm mortars at Uškoplje could not reach all of the suburbs or localities of Dubrovnik to the far northwest of the Old Town, although, between them, the two 120mm mortar batteries and the 82mm mortar battery at Strinčijera could target the whole of Dubrovnik, including the Old Town. There were also other 82mm mortars batteries in the 3/472 mtbr but the evidence does not clearly identify their location. There is also a question about the range of the 82mm recoilless cannons at Žarkovica. This is considered later in these reasons, where the finding of the Chamber is made that these cannons could target Srd and the Old Town from Žarkovica.

92. After this meeting in Ivanica, Lieutenant Pesić, stationed in the village of Bosanka, was contacted by his commander, Captain Stojanović, who had attended the meeting. Lieutenant Pesić was assigned the task of assembling a small squad of men to launch the assault against Srd the next morning.<sup>264</sup> Lieutenant Lemal who was at the Ivanica meeting was assigned the task of leading a second squad from his command post at Strinčijera in the assault against Srd.<sup>265</sup> These squads were to have the support of two T-55 tanks as well as the various artillery batteries.<sup>266</sup>

93. Captain Pepić was at his unit on the evening of 5 December 1991 when he received an order from his commander, Lieutenant-Colonel Stamenov, commander of the 107 OAG, to go to the observation point at Žarkovica by 0600 hours on the following morning. Captain Pepić was ordered to lend fire support to the 3/472 mtbr in taking control of the Srd feature. For this purpose he would be resubordinated to Captain Kovačević.<sup>267</sup> The observation post on Žarkovica was not always manned by members of Captain Pepić's battery – it was only when an attack was expected or an operation was to be launched.<sup>268</sup> It is Captain Pepić's evidence that his commander, Lieutenant-Colonel Stamenov, had attended the customary daily briefing of the command of the

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<sup>263</sup> Lieutenant Lemal, T 736.

<sup>264</sup> Lieutenant Pesić, T 7897.

<sup>265</sup> Lieutenant Lemal, T 7368-7369.

<sup>266</sup> Lieutenant-Colonel Stojanović, T 7800 ; 7849-7853 ; Captain Nešić, T 8166 ; Lieutenant Lemal, T 7369; Lieutenant Pesić, T 7897.

<sup>267</sup> Captain Pepić, T 7481-7482.

9 VPS in Kupari and that it was here that he had received the information about the attack, which he had subsequently conveyed to Captain Pepić.<sup>269</sup>

94. Additional preparations for the attack were made during the night. During the Ivanica meeting, Lieutenant Lemal had requested equipment to support the mission, including flak jackets, plastic explosives and grenades. This was delivered to his position at Strinčijera by Admiral Jokić's Chief of Staff, Warship-Captain Zec, sometime before midnight,<sup>270</sup> evidence which offers yet further confirmation of the direct involvement of the staff of the command of the 9 VPS, especially the Chief of Staff. Similarly, Lieutenant-Colonel Stojanović had requested certain equipment to enable Lieutenant Pesić to carry out his assigned task in the attack on Srđ. During the night Lieutenant-Colonel Stojanović was contacted by phone and asked to report to Žarkovica, where he picked up the equipment he had requested.<sup>271</sup>

95. Admiral Jokić testified when recalled in rebuttal that on 5 December 1991, after the negotiations in Cavtat were completed, he reported to the 2 OG in Trebinje where he informed the Accused about the agreement reached with the Croatian authorities.<sup>272</sup> On his evidence, the Accused then issued an order for a formal ceasefire to take effect on 6 December 1991 at 1200 hours.<sup>273</sup> Admiral Jokić informed Warship-Captain Zec by telephone and instructed him to order the subordinate units to respect the ceasefire.<sup>274</sup> There is, however, no other evidence and no written record or message in evidence confirming that such an order was actually issued by the Accused on 5 December 1991. Given that the basis for the order was a ceasefire agreement yet to be concluded, it would be strange for such a finite order to be issued. The probabilities are that the Accused indicated he would be prepared to issue an order for such a ceasefire if an agreement was concluded and that Admiral Jokić informed his senior staff of this, whether by telephone or on his return to Kupari from Trebinje by about 1700 hours on 5 December 1991. While they are the probabilities, the Chamber is not able to make specific findings. It will therefore include in its consideration the possibility that on 5 December 1991, the Accused did issue an order for a ceasefire to take effect at 1200 hours on 6 December 1991. It is to be noted, however, that the plan for the attack was for Srđ to be taken before 1200 hours.

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<sup>268</sup> Captain Pepić, T 7482.

<sup>269</sup> Captain Pepić, T 7490-7491.

<sup>270</sup> Lieutenant Lemal, T 7369-7370.

<sup>271</sup> Lieutenant-Colonel Stojanović, T 7825. *See also* Captain Nešić, T 8167. He was located at Žarkovica and testified that Lieutenant-Colonel Stojanović picked up some equipment for his troops on the evening of 5 December 1991.

<sup>272</sup> Admiral Jokić, T 8537; 8565.

<sup>273</sup> Admiral Jokić, T 4040-4041; 4053.

<sup>274</sup> Admiral Jokic, T 8568-8569; 8582-8583.

96. While it is clear, in the Chamber's finding, that the attack on Srd was planned and preparations were made on 5 December for it to commence with first troop movements at about 0500 hours on 6 December 1991, some JNA records and some subsequent reports appear to present a different picture. This is that the attack was initiated by Captain Kovačević alone, on his own initiative, in the early morning of 6 December 1991, in response to "provocations" by the Croatian defenders at Srd during the night of 5-6 December which led to casualties, even a fatality, among Captain Kovačević's troops. These records include entries in the 9 VPS log of messages that Captain Kovačević had reported provocations during the night, that he had opened fire on Srd with 120mm mortars and that "he decided alone to do so".<sup>275</sup> There is also Admiral Jokić's action report of 7 December 1991 in which it is said that Captain Kovačević "declared that no one authorised that action and that he received warning on 05.12.1991 from the Chief of Staff 9 VPS regarding the absolute ceasefire...".<sup>276</sup> The Chamber notes that in this report, Admiral Jokić ornamented the story even further by adding that Captain Kovačević acted in the general action plan of the Attack Order of 9 November 1991, which had included the objective of taking Srd, an objective which had not been achieved by 6 December 1991.<sup>277</sup> In the Chamber's finding, these entries were contrived and false. The reports were deliberately deceptive. The attack was not spontaneous on the part of Captain Kovačević on 6 December 1991. The attack was entirely pre-planned and coordinated on 5 December 1991 by 9 VPS staff including Warship-Captain Zec. Any casualties to JNA units followed the commencement of the attack, rather than preceded it, but in any event, whether or not there were casualties in the night, the attack was planned on 5 December 1991 to occur on the morning of 6 December 1991.

97. Questions arise whether the false reports and records were contrived after the event, or were part of a deliberate plan put in place to provide the JNA with a ready justification for its conduct. Some reports were made after the events, other records appear contemporaneous, though contrived. Admiral Jokić suggests this was part of a scheme to deceive him. For reasons given elsewhere in this decision, the Chamber does not reject this out of hand but sees it to be an improbable explanation. Whether or not Admiral Jokić was being deceived, the circumstances reveal that the JNA deliberately put in place false records to indicate that the attack was undertaken spontaneously by Captain Kovačević by virtue of Croatian "provocations" during the night of 5-6 December 1991. This required planning and coordination of some sophistication. Contrary to what is suggested by the false records, the Chamber finds that Captain Kovačević was carrying out orders, given the

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<sup>275</sup> Exhibit D96, p 67.

<sup>276</sup> Exhibit D65.

<sup>277</sup> Exhibit D65.

previous day, in making the attack. It was not his own spontaneous and ill-considered action on the morning of 6 December 1991.

98. These matters provide further reason to reflect on the evidence of Lieutenant-Colonel Jovanović that, at the meeting at Kupari on the evening of 5 December 1991, Captain Kovačević proposed the attack on the basis on previous provocations by Croatian forces at Srđ. This is, of course, a different position from that presented by the JNA records referred to above which provided an excuse for the JNA, *i.e* an attack by a rogue commander—Captain Kovačević whose nickname was “Rambo”—acting without authority and contrary to orders. That position was in fact taken by the JNA, including the command of the 2 OG, publicly and when dealing with Croatian representatives after the attack.<sup>278</sup> However, the evidence of Lieutenant-Colonel Jovanović contradicts that account. What it does is to offer some foundation for an argument advanced by the Defence that what occurred was in truth a plan hatched and implemented by the 9 VPS including Admiral Jokić, without the Accused’s knowledge and contrary to his orders. In this respect, the Chamber finds this aspect of the evidence of Lieutenant-Colonel Jovanović to be no more satisfactory or convincing than other material passages considered and rejected elsewhere in this decision.<sup>279</sup> The Chamber does not accept the truth of this evidence.

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<sup>278</sup> Exhibits P61, tab 35; P162, p 18.

<sup>279</sup> See *infra*, paras 161-169.

## **B. The attack on the Old Town on 6 December 1991 – the experience of the residents**

99. Well before sunrise, at around 0550 hours on the morning of 6 December 1991, residents of the Old Town of Dubrovnik awoke to the sound of explosions. An artillery attack had commenced. It continued for most of the day with a brief but not complete lull a little after 1115 hours. Especially in the afternoon, it tended to be somewhat sporadic. Initially, the firing was mainly concentrated on, but not confined to, the area around Mount Srd, the prominent geographical feature of Dubrovnik located nearly one kilometre to the north of the Old Town. There was a Napoleonic stone fortress, a large stone cross and a communications tower at Srd.<sup>280</sup>

100. Zineta Oresta, residing at Od Sigurate Street 2 in the Old Town, and Mato Valjalo, who was staying with his father-in-law in his apartment in the Old Town on Prijeko Street,<sup>281</sup> both saw shells falling on the fortress at Mount Srd around or just after 0600 hours.<sup>282</sup> Ivo Vlašica, who had set out on foot from Babin Kuk towards the Old Town around 0500 hours, was passing Boninovo at 0600 hours. He saw Srd on his left where “large-scale shelling had started and a great deal of shooting”.<sup>283</sup> The ECMM monitors, who were located at the Hotel Argentina, less than one kilometre to the southeast of the Old Town, maintained a log sheet of events that day.<sup>284</sup> The first entry at 0600 hours reads as follows: “Shelling from land and sea towards the fortress close to the TV tower (Srd) and the harbour commenced.” The log indicates that this shelling was still in progress at 0640 hours.<sup>285</sup> The Chamber notes that this reference to shelling from the sea has little other support in the evidence and if there was some initial naval shelling, as to which no finding can be made on the evidence, it was not maintained during the day. The substantial body of the evidence points to the use only of JNA land based artillery. It is accepted by the Chamber, however, that shells, *inter alia*, initially fell on the harbour—*i.e.* the port of the Old Town, as observed by the ECMM monitors. A radio log of the SFRY maintained by one of the ships around Dubrovnik reports strong protests from the ECMM and the Dubrovnik Crisis Staff in relation to the shelling in the early morning hours of 6 December 1991.<sup>286</sup> At 0612 hours it is recorded that the ECMM lodged the following protest with Admiral Jokić: “We strongly protest against the bombing of several parts of Dubrovnik that started at about 0600 hours on 6 December 1991 and insist on an

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<sup>280</sup> Exhibit C1/1, pp 6 and 8; Exhibit C1/2.

<sup>281</sup> Exhibit P54, house marked as 1.

<sup>282</sup> Zineta Oresta, T 3464-3465; Mato Valjalo, T 2000-2001.

<sup>283</sup> Ivo Vlašica, T 3321. Colin Kaiser, a UNESCO representative, who was staying in the Old Town at the Institute for the Protection of Cultural Heritage opposite the Dominican Monastery, also testified that, initially, the explosions appeared to be coming from the direction of Mount Srd. Colin Kaiser, T 2430-2432. Ivo Grbić who lived at Od Puca 16 in the Old Town, having been awoken at 05:50 hours stole a glance from his window towards Mount Srd where he observed “constant explosions and thick smoke rising”. Ivo Grbić, T 1357-1359.

<sup>284</sup> Exhibit P61, tab 30.

<sup>285</sup> Exhibit P61, tab 30.

<sup>286</sup> Exhibit P162, pp 10-11.

immediate cessation of fire.” A similar protest from the Dubrovnik Crisis Staff is reflected in the next entry and reads as follows: “We strongly protest against the unprovoked strong artillery fire at 0550 hours this morning from the Strinčjera and Dubrave areas of the Srd feature, and tank and mortar fire on Dubrovnik.”<sup>287</sup>

101. There were several people in Nikola Jović’s shop at Miha Pracata 11<sup>288</sup>, which had opened for business as usual that morning around 0600 hours, by the time the shells started falling on the Old Town.<sup>289</sup> Nikola Jović described the scene in his shop that morning:

The first shells that resounded nearby, we weren’t even aware that those had fallen on the Old Town because we were inside the shop working, but the sounds of firing got closer and closer. So people who kept coming in were stunned and told us that shells had begun to fall all over the Stradun, the fountain, and St. Blaise Church. And then the shooting kept inching closer and closer to us, and it kept growing in intensity. So at one point, when the attack was the heaviest, there would be five or six shells landing at the same time all over the Old Town, so that the whole town had been under attack, the Old Town.<sup>290</sup>

Ivo Vlašica, from the vantage point of his shop on Od Puca street in the Old Town, first saw a shell landing on the Old Town between 0630 and 0700 hours on the morning of 6 December.<sup>291</sup> Witness A, who was sheltering in the bathroom of his apartment in the Old Town<sup>292</sup> at the time, testified that the shells started to fall “right around the building itself” from 0600 hours onwards. He testified that: “From 0600 o’clock practically every second, every other second, a shell would fall in various places within the old walls.”<sup>293</sup> The Chamber regards this description of the frequency of the shelling as impressionistic rather than accurate. From the windows in his attic, which looked out onto Stradun,<sup>294</sup> Witness A saw construction material falling from the roofs and buildings on the Stradun.<sup>295</sup> He described the scene that day as a kind of hell:

The explosions were terrible. One followed another. The buildings were shaking as if there was an earthquake going on. There was smoke everywhere. There was dust everywhere. There were these blazing lights coming in through the window. To put it quite simply, it was hell.<sup>296</sup>

At 0710 hours a shell exploded in the attic of Ivo Grbić’s house at Od Puca 16 in the Old Town. A further shell at 0720 hours caused the attic to catch alight.<sup>297</sup>

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<sup>287</sup> Exhibit P162, pp 10-11.

<sup>288</sup> Nikola Jović, T 2926.

<sup>289</sup> Nikola Jović, T 2932-2933.

<sup>290</sup> Nikola Jović, T 2934-2935.

<sup>291</sup> Ivo Vlašica, T 3310; 3321.

<sup>292</sup> Witness A, T 3624-3626.

<sup>293</sup> Witness A, T 3626-3627.

<sup>294</sup> Witness A, T 3625.

<sup>295</sup> Witness A, T 3627.

<sup>296</sup> Witness A, T 3627.

<sup>297</sup> Ivo Grbić, T 1360-1361.

102. The ECMM monitors, located in Hotel Argentina, recorded their first sighting of impacts in the Old Town at 0720 hours. At 0725 hours it is written: "Five impacts in the Old City close to and in the harbour area. Constant artillery and mortar shelling in progress. More impacts in the Old Town". Then at 0732 hours: "Minimum 10 – 11 impacts in the old city so far."<sup>298</sup> The Chamber notes that references in the ECMM log to the Old City are to what the Chamber refers to as the Old Town.

103. As the protests and other evidence records, some shelling occurred on residential areas of Dubrovnik, including the Old Town and on the port of the Old Town, virtually from the outset of the attack, notwithstanding an initial primary concentration on Srd. However, the focus of the attack came to shift from Mount Srd to the wider city of Dubrovnik, including the Old Town. It is difficult from the evidence of those in Dubrovnik to pinpoint with precision when this shift of focus occurred. As will be mentioned later, other evidence discloses this shift of focus to have occurred at about 0800 hours.

104. At 0800 hours a shell landed in the street directly outside Nikola Jović's shop in the Old Town on Miha Pracata street: "There was a bang and the door opened wide. Shrapnel was flying around the shop. The till was shattered and so was the door. There was a lot of dust in the air and for a while we didn't know where we were."<sup>299</sup> Nikola Jović described the fire he saw when the shell landed:

It's a conflagration. I'm not sure how to say it. When a shell falls – I was there, and I looked on. It's a flash. It's difficult to describe what it feels like when something like that is happening nearby. You just can't believe it. You don't know what to do. It's a huge flash, and then there's a powerful explosion, and then there's a lot of dust in the air suddenly and smoke. So the whole thing was quite horrifying.<sup>300</sup>

The entry in the ECMM log sheet at 0845 hours, after recording the initial impacts in the Old Town reads: "Up till now continuous shelling. Several (rounds) impacts fairly close to hotel. Broken windows etc."<sup>301</sup>

105. A compilation of video footage from some 15 domestic and foreign photographers of the events of 6 December 1991 in Dubrovnik was compiled by Mr Benić<sup>302</sup> and admitted as an exhibit in this case.<sup>303</sup> Some of the film clips from that day are date stamped and others are time stamped. The impression given is that the editor has sought to maintain chronological order in presenting events, however, there is no guarantee that this was in fact achieved. The video shows military

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<sup>298</sup> Exhibit P61, tab 30.

<sup>299</sup> Nikola Jović, T 2936-2937.

<sup>300</sup> Nikola Jović, T 2938.

<sup>301</sup> Exhibit P61, tab 30.

<sup>302</sup> Ivo Grbić, T 1422-1423. Mr Benić was a journalist from the Dubrovnik Television.

activity, including artillery fire, on and around Srd between at least 0648 and 0713 hours. Sometime between 0705 hours and 0713 hours that morning, the Dubrovnik defence warning siren sounded.<sup>304</sup> The two subsequent clips, neither of which are time-stamped and which bear the logo “SAR”, show smoke coming from the Old Town and an explosion in the Old Town (in the vicinity of the Dominican monastery).<sup>305</sup> The first time-stamped clip showing smoke coming from the Old Town and recording the sounds of explosions were recorded at 0747 hours.<sup>306</sup>

106. The Chamber notes that while the evidence varies in its detail and as to times, that does not indicate it is unreliable or necessarily conflicting. Witnesses giving evidence of these events were necessarily seeking to remember their observations made over 13 years earlier. Some faults of recollection were undoubtedly due to this lapse of time. Perhaps more significantly, the original observations were made during a significant artillery attack. The conditions were naturally alarming to those exposed to this experience. It is clear that, for the most part, the witnesses sought cover during the attack. None of them in Dubrovnik exposed themselves at good vantage points so as to have a broad overview. Rather they made hasty occasional observations during the attack, so that their observations were intermittent and tended to be limited to a confined locality. The evidence of ECMM monitors suggests that they felt obliged to take shelter many times during the day so that their recorded observations are by no means a complete record of events; further their observations were made from their hotel which was on the seafront, nearly a kilometre to the southeast of the Old Town and not from a high vantage point.

107. The precise pattern of the shelling and the details of its ebbs and flows on 6 December 1991 are again, imprecise. As mentioned above, the Chamber has had recourse to the ECMM log sheet<sup>307</sup> which, despite the matters just mentioned, offers a useful account giving some indication of the frequency and intensity of the explosions throughout the day. The Chamber accepts from this log and other evidence<sup>308</sup> that the most intense periods of shelling occurred in the morning hours, between 0900-0930 and about 1100 hours. The relevant entries in the ECMM log read as follows:

0930 – 0945:	Shelling of the Old Town intensified. Main area of impacts seems to be TOWN HALL and PLAZZA. Absolutely white smoke after impacts. Parts of unknown rocket which landed outside hotel main entrance were brought down approx 30 min ago
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<sup>303</sup> Exhibit P66.

<sup>304</sup> The siren can be heard clearly in the clip time-stamped 0713 hours, but not in the previous clip time-stamped 0705 hours. See Exhibit P66 at 31.01 minutes. See also, Exhibit D108.

<sup>305</sup> Exhibit P66 at 31.14 and 31.16 minutes.

<sup>306</sup> Exhibit P66 at 31.20 minutes.

<sup>307</sup> Exhibit P61, tab 30.

<sup>308</sup> Exhibit P164, a Report on enemy combat operations on 5 and 6 December 1991 by the Defence command of Dubrovnik, states that the “fiercest fighting took place between 0900 and 1000 hours when the enemy directed all artillery pieces to fire on the old and new towns, which inflicted serious damage on the old town.”

0945 – 1000:	Between 10 and 15 heavy explosions heard pr minute
1010:	6 impacts on LOKRUM
1015 – 1045:	Shelling continues of all areas of DUBROVNIK [...].
1045 – 1100:	Frequency is now 15 heavy shells pr minute with some minutes interval
1100:	Now it is really burning in the old town. Frequency is slowing down again.
1119:	From this time frequency dropped considerably.

As noted by the ECMM monitors, the Chamber finds that a considerable drop in the frequency of the shelling occurred late-morning. Some evidence suggests this could have occurred a little after 1100 hours,<sup>309</sup> at which time the frequency was noted by the ECMM monitors to be slowing. However, they did precisely identify a considerable drop in frequency at 1119 hours. It is not the case that the shelling ever ceased entirely, but the frequency of shots slowed considerably. This lull was not long-lived, however, and shelling picked up again, well before 1200 hours, and continued though more sporadically.

108. It was at around 1130 hours that Nikola Jović and his sister left the shop in Miha Pracata street and walked through the Od Puca street, through Stradun, out of the Old Town through the Pile Gate, towards Boninovo and home to Gruž, which indicates that the intensity of the shelling at this time had considerably eased.<sup>310</sup> It continued, however, as described by the visual and oral evidence. For example, the building where Lucijana Peko<sup>311</sup> was staying on Prijeko Street was hit sometime between 1100 and 1200 hours on 6 December. As she described it, the building shook, like it was an earthquake.<sup>312</sup> She and the other residents felt totally unprotected, and, around 1300 hours when the shelling was a little less intense, they all moved to a neighbouring building which could provide a little more protection.<sup>313</sup> Other residents of the Old Town also suffered direct hits during this time. The roof of Witness A's building was hit by a projectile sometime between 1200 and 1300 hours.<sup>314</sup> When he later had a chance to inspect the damage, Witness A discovered that two projectiles of different calibres had hit the roof. He found the stabiliser fin of one of the mortar shells, 120mm calibre, on the sofa right below the point of damage.<sup>315</sup> The ECMM log records

<sup>309</sup> Colin Kaiser testified that around 1100 hours the shelling decreased to almost nothing, although shells were still falling periodically, T 2433.

<sup>310</sup> Nikola Jović, T 2948.

<sup>311</sup> Lucijana Peko had moved with her family on 7 October 1991, from an area of greater Dubrovnik called Sveti Jakov, to stay with a friend in her house on Prijeko Street in the Old Town, T 1841-1843. The family had made the decision to move because it was felt that the Old Town was protected and would not come under attack, T 1844.

<sup>312</sup> Lucijana Peko, T 1848-1849.

<sup>313</sup> Lucijana Peko, T 1849.

<sup>314</sup> Witness A, T 3627-3628.

<sup>315</sup> Witness A, T 3633-3634.

sporadic shelling prior to 1200 hours which appeared to be in the direction of the Old Town. The monitors also recorded artillery fire.

109. Returning to the compilation video of the attack, it demonstrates that by 0934 hours, many boats in the harbour of the Old Town had been hit and were billowing black smoke into the atmosphere above the Old Town.<sup>316</sup> These appeared to be the larger vessels. A clip, without date or time-stamp, which appears later in the chronology of the video, shows a car driving down Stradun. The Chamber is of the view that this clip is out of time order in the video and should be placed earlier because in this clip there is a noticeable lack of damage and debris on the Stradun. This indicates it was filmed earlier in the day, as confirmed by other evidence, *e.g.* the testimony of Witness A who described damage to the Stradun from 0600 hours onwards.<sup>317</sup> The video also contains a clip, time-stamped 1243 hours, which indicates that by this time the Old Town had sustained considerable damage. Subject to these comments, in the Chamber's finding, the video provides an intermittent overview of the Old Town during the attack and clearly reveals fires burning fiercely in many of its locales.<sup>318</sup>

110. One witness who was present in the Old Town that day puts the final cessation of shelling as early as around 1500 hours.<sup>319</sup> However, the ECMM log records an entry "No shelling for 20 minutes", at 1630 hours, which is followed by a record of at least four explosions (position identified) after which it is noted that the ceasefire appears to be holding, but some shelling occurring "NW of Hotel Argentina". There were other reports of sporadic shelling into the early evening.<sup>320</sup> At 1915 hours, the entry in the ECMM log indicates that there is nothing to report and that there has been "no shelling to the best of our knowledge". The entry at 1925 hours records the end of the general emergency alert over Dubrovnik.<sup>321</sup> The Chamber finds that shelling decreased noticeably from around 1500 hours and had substantially ceased by a little after 1630 hours, *i.e.* the shelling of Dubrovnik, including the Old Town, had continued for over ten and a half hours on 6 December 1991.

111. It must be noted that while some of the evidence specifically dealt with shelling in the Old Town, generally the witnesses did not distinguish between shelling which fell on the Old Town and shelling on the other areas of Dubrovnik. The attack was certainly not confined to the Old Town. Indeed, there was particularly heavy shelling to areas to the northwest of the Old Town and in the

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<sup>316</sup> Exhibit P66 (at 31:37 and 31:40).

<sup>317</sup> See for example, Witness A, T 3627.

<sup>318</sup> Exhibit P66 (at 32:13).

<sup>319</sup> Colin Kaiser, T 2432-2435.

<sup>320</sup> Witness A, T 3633.

<sup>321</sup> See generally, Exhibit P61, tab 30.

vicinity of hotels both to the northwest and southeast of the Old Town. Like the Old Town, generally speaking, these were all residential areas.

112. The attack on Dubrovnik, including the Old Town, on 6 December 1991 inevitably gave rise to civilian casualties. While the Chamber heard evidence of many more victims of the shelling that day, the Third Amended Indictment charges the Accused only in relation to two deaths and two victims of serious injuries, both alleged to have occurred in the Old Town. The evidence relating to these particular victims is discussed in greater detail later in this decision.<sup>322</sup> It may be safely assumed, however, that the strength of the old stone buildings in the old Town, and the use of designated shelter areas by many of the residents, did much to minimise the loss of life and injuries in the Old Town that day. Civilian, religious and cultural property, in particular in the Old Town, also suffered heavy damage as a result of the attack. The Chamber discusses the details of the evidence relating to the damage to property later in this decision.<sup>323</sup>

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<sup>322</sup> See *infra*, paras 243-259 ; 264-276.

<sup>323</sup> See *infra*, paras 313-330.

### **C. The attack on the Old Town of Dubrovnik on 6 December 1991 - the attackers**

113. The Chamber finds that on 6 December 1991, units of the 9 VPS of the JNA again attempted to take Mount Srd, which was the dominant feature and the one remaining position held by Croatian forces on the heights above Dubrovnik. This attempt commenced between 0500 and 0600 hours under cover of darkness. It was undertaken by two small infantry units of the 3/472 mtbr. One under the command of Lieutenant Lemal approached Srd from his nearby command post at Strincijera. The other under the command of Lieutenant Pešić approached Srd from the village of Bosanka. Each had close tank support. Less than 40 soldiers made the attack. Even so the defending Croatian forces on Srd were heavily outnumbered.

114. A little before 0600 hours, more than half an hour before sunrise, JNA units commenced a mortar and other artillery barrage on Srd with the objectives of damaging the Croatian defensive positions, pinning down the defenders to enable the attacking forces to approach, and exploding some of the defensive mines which had been laid by the Croatian forces. The artillery barrage no doubt made clear the JNA intentions and, as the two attacking units approached Srd, they came under defensive fire from Srd. In time Croatian 82mm mortar and machine-gun fire was commenced from the city of Dubrovnik against the attacking troops. As sources of the Croatian fire from Dubrovnik were identified, some JNA mortar and other artillery fire was directed against them. The JNA attacking troops suffered casualties, including one death, and one of the supporting tanks suffered damage and was withdrawn to a distance from which it could continue to fire at the Croatian defensive positions while being itself safe from further attack.

115. By about 0800 hours, the attacking forces had approached sufficiently close to Srd to be themselves threatened by the JNA artillery barrage. The barrage of Srd was called off so that the troops could continue to advance. They were, however, still under mortar attack from Croatian positions in Dubrovnik as well as defensive fire from Srd. While there had been some shelling of Dubrovnik, including the Old Town, virtually from the commencement of fire by JNA batteries, from the time of the cessation of the JNA artillery barrage on Srd, at about 0800 hours, the full force of the active JNA mortars and other artillery, including Maljutka rockets or missiles, appears to have been directed at Dubrovnik, including the Old Town. As the evidence of those in Dubrovnik, which was reviewed earlier, indicates the attack on Dubrovnik grew in intensity reaching its maximum force between approximately 0900-0930 and 1100 hours. This appears to have coincided with the period when the efforts of the attacking JNA troops on Srd to dislodge the Croatian defenders were at their most desperate.

116. The JNA plan was to take Srd quickly, certainly before 1200 hours, when a ceasefire was anticipated to come into force in the area. The capitulation of the Croatian defenders of Srd during

the morning appears to have been anticipated by Captain Kovačević who had the immediate command of the attacking troops and who coordinated the artillery and ground forces from Žarkovica, a position which gave him an excellent overview of both Srd and Dubrovnik, especially the Old Town.

117. There was no capitulation by the Croatian defenders. The close fighting at Srd was desperate. While precise times cannot be determined on the evidence, at one stage the defenders retreated into underground levels in the fortress and called in Croatian mortar fire on JNA forces surrounding the fortress. Attempts to dislodge or overcome the defenders were unsuccessful. At a time after 1400 hours, the JNA troops were permitted to withdraw from Srd. Withdrawal was also a difficult process and it was not until after 1500 hours that this was completed.

118. The JNA plan to take Srd had failed. Casualties had been suffered, with five men killed and seven wounded among the troops of the 3/472 mtbr. JNA artillery continued to fire on Dubrovnik until after 1630 hours, although with noticeably reduced intensity after 1500 hours. Dubrovnik, including the Old Town, had been under artillery attack for over ten and a half hours. The experience for those in Dubrovnik has been briefly outlined earlier in this decision. Its effect will be dealt with in more detail later.

119. The Chamber now turns to consider in greater detail the evidence dealing with these events. This aspect of the evidence is particularly characterised by conflict and confusion. No doubt the many years that have passed since these events have affected the accuracy and reliability of the memories of witnesses. The Chamber is persuaded, however, that some evidence it has heard, in particular concerning the JNA, was not truthful. Further, the Chamber is satisfied that a number of contemporary reports and records are misleading, deliberately so, and do not reflect the truth. In the face of these difficulties, it is not possible for the Chamber to be satisfied where the truth lies in respect of a number of issues. Some matters, therefore, have had to be left without findings.

#### **D. The events of 6 December 1991**

120. The Chamber has already set out in summary form the actual course of the attack on Srđ. What follows is an outline of the more important detailed evidence about the attack and the findings of the Chamber. Where a distinction between these is intended, it should be apparent from the text.

121. At about 0500 hours on the morning of 6 December 1991, under cover of darkness, Lieutenant Lemal leading 20-25 men set out for Srđ from Strinjčera,<sup>324</sup> and Lieutenant Pesić with 12-14 troops set out for Srđ from Bosanka.<sup>325</sup>

122. At around 0600 hours, the troops advancing on Srđ observed that JNA ZIS cannons opened fire at the lower fortifications around Srđ where Croatian snipers had dug in,<sup>326</sup> and in addition, a mortar barrage was directed at Srđ.<sup>327</sup> As Lieutenant Pesić and his group advanced uphill towards Srđ, they had to cross rocky and exposed terrain which afforded no natural shelter and no opportunity for camouflage.<sup>328</sup> About 400 or 500 metres from the Srđ feature Lieutenant Pesić and his soldiers came under fire. This was from two 82mm mortars which he describes as firing from the area of the tennis courts in Babin Kuk.<sup>329</sup> The T-55 tank supporting Lieutenant Pešić's group at this point also came under lateral fire from the direction of Dubrovnik.<sup>330</sup> In addition to attracting fire from positions in the wider Dubrovnik area, they were also shot at from Srđ as they continued to advance.<sup>331</sup> The T-55 tank accompanying the group fired three or four shells at the Srđ feature during the advance.<sup>332</sup> The Chamber notes that the references to fire from the direction of Dubrovnik, or the wider Dubrovnik, are not evidence of firing from the Old Town. The Chamber also observes that the firing from the area of tennis courts at Babin Kuk is an apparent misdescription; other evidence indicates this to have been from the area of tennis courts at Hotel Libertas. Both the Hotel Libertas and Babin Kuk are well to the northwest of the Old Town.

123. Approaching 0800 hours, Lieutenant Lemal and his men were within 600 metres of Srđ. Lieutenant Lemal fired a rocket to signal that JNA artillery fire against Srđ should cease for the

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<sup>324</sup> Lieutenant Lemal, T 7368-7369 ; T 7371.

<sup>325</sup> Lieutenant Pesić, T 7897-7899; Lieutenant Lemal, T 7371.

<sup>326</sup> Lieutenant Lemal, T 7371. According to him, these ZIS cannons would have been located in the Vlastica sector on 6 December 1991, T 7349. Admiral Jokić said the ZIS cannons were near Uškoplje, T 4020-4021. Lieutenant Pesić testified that the attack commenced at around 0600 hours with firing from Uškoplje, T 7898. Firing at targets on the slopes of Srđ can clearly be seen in the video compilation between 0648 and 0651 hours on the morning of 6 December 1991. See Exhibit P66 (at 30:40-30:52).

<sup>327</sup> Lieutenant Lemal, T 7371, 7413.

<sup>328</sup> Lieutenant Pesić, T 7902.

<sup>329</sup> Lieutenant Pesić, T 7898. Lieutenant-Colonel Stojanović testified that Lieutenant Pesić's group was fired upon from the Dubrovnik area with anti-aircraft guns as they were moving towards Srđ, T 7827.

<sup>330</sup> Lieutenant Pesić, T 7901-7902.

<sup>331</sup> Lieutenant Pesić, T 7912-7915.

<sup>332</sup> Lieutenant Pesić, T 7913.

safety of the infantry troops.<sup>333</sup> Lieutenant Lemal testified that one of his soldiers was killed on the approach to Srd,<sup>334</sup> and a supporting tank was hit on the road between Strinčjera and Srd.<sup>335</sup> The tank was ordered to retreat to a position where it could not be fired at, but from which it could still support the troops.<sup>336</sup>

124. Lieutenant Pesić's unit was the first to arrive at the Srd feature just before 0800 hours.<sup>337</sup> He requested *via* radio that JNA artillery fire on Srd cease to allow the assault group to continue with the attack.<sup>338</sup> Lieutenant Pesić and his men engaged in hand-to-hand combat with the Croatian soldiers remaining in the fortress.<sup>339</sup> The Croatian defenders eventually retreated into what was described as the system of tunnels underlying the fortress at Srd.<sup>340</sup> Lieutenant Pesić called on the Croatian defenders to surrender but they fought back with grenades.<sup>341</sup> After about 30 minutes of fighting, Lieutenant Pesić was wounded by a grenade. He was initially relieved by Tuka Miralem, a junior sergeant, and then by Captain Stojanović.<sup>342</sup> Lieutenant Lemal's squad arrived at Srd after Lieutenant Pesić's to find that the Croatian defenders had already retreated underground.<sup>343</sup> Once the JNA had thus seized control of the Srd plateau, it came under fierce mortar attack from Croatian forces.<sup>344</sup> Lieutenant Lemal's evidence was that the mortar fire originated in the area of Lapad, which is also well to the northwest of the Old Town. Initially the firing was moderate, but it soon increased in intensity.<sup>345</sup>

125. When their troops first came under attack, the leaders of both assault groups requested artillery support from the commander, Captain Kovačević at Žarkovica, in line with the battle plan that had been conveyed to them the night before. Lieutenant Pesić requested his superior to open fire at the positions that constituted the greatest threat.<sup>346</sup> The battalion commander, Captain Kovačević, responded that the fire group from the Uškoplje feature could not fire on the area of Babin Kuk as it was out of range.<sup>347</sup> Similarly, Lieutenant Lemal had contacted Captain Kovačević by radio when he had discovered the source of the firing, seeking his assistance in neutralising the

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<sup>333</sup> Lieutenant-Lemal, T 7371-7372; 7413.

<sup>334</sup> Lieutenant Lemal, T 7414.

<sup>335</sup> Lieutenant Lemal, T 7372.

<sup>336</sup> Lieutenant Lemal, T 7372.

<sup>337</sup> Lieutenant Pesić, T 7912-7915.

<sup>338</sup> Lieutenant Pesić, T 7912-7915.

<sup>339</sup> Lieutenant Pesić, T 7912-7915.

<sup>340</sup> Lieutenant Pesić, T 7912-7915.

<sup>341</sup> Lieutenant Pesić, T 7912-7915.

<sup>342</sup> Lieutenant Pesić, T 7912-7915.

<sup>343</sup> Lieutenant Lemal, T 7413-7414.

<sup>344</sup> Lieutenant Lemal, T 7373-7374.

<sup>345</sup> Lieutenant Lemal, T 7374-7375.

<sup>346</sup> Lieutenant Pesić, T 7902.

<sup>347</sup> Lieutenant Pesić, T 7902-7903.

fire, as Lieutenant Lemal's unit was incurring losses.<sup>348</sup> Captain Stojanović, who replaced the injured Lieutenant Pesić, also requested artillery support to neutralise lethal fire on Srd. His evidence was that this support was never provided.<sup>349</sup>

126. As previously indicated, the infantry and artillery actions that day were overseen and coordinated by the commander of the 3/472 mtbr Captain Kovačevic, who was located at his observation post on Žarkovica, a small plateau<sup>350</sup> about two kilometres to the southeast of the Old Town, with views to the northwest down to the Old Town and up to the feature of Srd. In addition to Captain Kovačević, the following senior officers were present at Žarkovica that day, assisting in various capacities in the attack. Captain Jovica Nešić, commander of the anti-armour company of the 3/472 mtbr<sup>351</sup> whose unit was positioned at Žarkovica on 6 December.<sup>352</sup> Captain Pepić, who was serving with the 107 OAG as commander of the 130mm battery.<sup>353</sup> On 6 December, his unit's battery of four 130mm howitzers was located at the Čilipi airport.<sup>354</sup> He was to relay firing orders from Captain Kovačević and give firing corrections.<sup>355</sup> There were also smaller calibre howitzers at Čilipi.<sup>356</sup> Captain Drljan, a staff officer from the 9 VPS at Kupari arrived at Žarkovica he thought at around 0800 hours and stayed for about an hour,<sup>357</sup> although he returned later in the afternoon.<sup>358</sup> Significantly, in the Chamber's finding, Warship-Captain Zec, Chief of Staff of Admiral Jokić, arrived, it is said, at sometime around 0800 hours, although apparently later than Captain Drljan, and remained throughout the day's action.<sup>359</sup> Other senior 9 VPS staff officers were also at Žarkovica at times during the day.

127. Captain Nešić's anti-armour company at Žarkovica<sup>360</sup> was equipped from September 1991 with six anti-armour recoilless cannons (82mm) and six anti-armour 9K11 self-guided missile launchers (Maljutkas).<sup>361</sup> There was also one mortar and a 76mm ZIS cannon.<sup>362</sup> There was also at least one tank but the evidence does not enable a finding whether this remained at Žarkovica on 6 December 1991 or was used in the assault on Srd. An anti-aircraft weapon was also mentioned by Witness B but the Chamber cannot accept it to be established whether this was in position on

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<sup>348</sup> Lieutenant Lemal, T 7375-7376.

<sup>349</sup> Lieutenant-Colonel Stojanović, T 7831-832.

<sup>350</sup> Captain Pepić, T 7486-7489.

<sup>351</sup> Captain Nešić, T 8150-8151.

<sup>352</sup> Captain Nešić, T 8168 ; Lieutenant Lemal, T 7348.

<sup>353</sup> Captain Pepić, T 7471-7474.

<sup>354</sup> Captain Pepić, T 7473-475.

<sup>355</sup> Captain Pepić, T 7514-7518.

<sup>356</sup> Admiral Jokić, T 4063-4064.

<sup>357</sup> Captain Drljan, T 7698-701.

<sup>358</sup> Captain Drljan, T 7718.

<sup>359</sup> Captain Pepić, T 7483-7484.

<sup>360</sup> Captain Pepić, T 7486. He testified that there were Maljutkas and recoilless guns on Žarkovica that day, T 7532.

<sup>361</sup> Captain Nešić, T 8152.

<sup>362</sup> Captain Pepić, T 7486.

6 December 1991.<sup>363</sup> To the northern side of the small plateau of Žarkovica, directed more to Srd and Bosanka, were the recoilless guns.<sup>364</sup> It is Captain Pepić's evidence that three or four of them were mounted on the wall surrounding the Žarkovica plateau and one had been placed behind the wall directed to fire through an opening therein. Located to the southern side and directed more towards the city of Dubrovnik were the Maljutka launchers.<sup>365</sup> Subject to the issue of range, which is considered later, both the recoilless cannons and the Maljutkas could target Srd and the nearer residential areas of Dubrovnik, including the Old Town. Both Captain Nešić and Captain Pepić were operating from an observation post on the southern side of the plateau close to the Maljutka launchers.<sup>366</sup>

128. It was the evidence of Captain Nešić that the attack against Srd commenced at around 0500 hours<sup>367</sup> but it is not expressly stated whether he meant the firing upon Srd from Žarkovica or the commencement of the infantry approach towards Srd. The latter is consistent with the other evidence and is the finding of the Chamber. When firing did commence from Žarkovica, there was an attempt at countering fire from Dubrovnik. A few shells (three or four) landed near Žarkovica although none hit the JNA position.<sup>368</sup> This was the only incoming Croatian shelling which was observed in the vicinity of Žarkovica that day.<sup>369</sup> Shortly thereafter, the Croatian firing positions began to concentrate their firepower on Srd,<sup>370</sup> presumably in an attempt to repel the JNA's infantry attack on the feature. As the JNA troops attacking Srd came under increasing fire, it is the evidence of some witnesses who were at Žarkovica that the weapons at Žarkovica were used to target Croatian firing positions in and around Dubrovnik in an attempt to neutralise them.<sup>371</sup> The Chamber notes that this apparently includes the recoilless cannon.<sup>372</sup> Later, the Chamber records its findings concerning these aspects of the evidence.<sup>373</sup> Captain Nešić's evidence is that several times during the day Captain Kovačević ordered him to find the sources of the firing that was being directed at Srd and neutralise those positions.<sup>374</sup> Throughout the morning, until at least midday, there was no order to stop the firing.<sup>375</sup> Captain Nešić denied, however, that there was ever an order issued that day to target the Old Town.<sup>376</sup> It was the evidence of Captain Nešić that he could not

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<sup>363</sup> Witness B, T 5025-5026; Exhibit P154.

<sup>364</sup> Captain Pepić, T 7487; T 7518. See also Exhibit D103; Exhibit P154; Witness B, T 5025-026.

<sup>365</sup> Captain Pepić, T 7487-7489; Exhibit D103.

<sup>366</sup> Captain Pepić, T 7486-7489, Exhibit D103; Witness B, T 5025-5026.

<sup>367</sup> Captain Nešić, T 8168, T 8243.

<sup>368</sup> Witness B, T 5040; Captain Nešić, T 8168.

<sup>369</sup> Witness B, T 5041.

<sup>370</sup> Captain Nešić, T 8168.

<sup>371</sup> Captain Nešić, T 8184.

<sup>372</sup> Captain Nešić, T 8238.

<sup>373</sup> See *infra*, paras 182-193.

<sup>374</sup> Captain Nešić, T 8184.

<sup>375</sup> Captain Nešić, T 8184-8185.

<sup>376</sup> Captain Nešić, T 8240.

recall how many rounds of ammunition were fired that day.<sup>377</sup> This was his response to cross-examination on this issue. There is in evidence, however, a report that he prepared on 8 December 1991. This purports to detail the expenditure of ammunition and the targets engaged on 6 December 1991 from Žarkovica.<sup>378</sup> The report reads in relevant part:

During the action on Srd, I had the task of securing the left wing of the battalion and act against the located targets on the left (southern) slopes of Srd and the targets in the town which would potentially pose as a threat to actions of the units on Srd. During the carrying out of the task, I had used the following amount of ammunition, and on the following targets:

Rocket 9K11<sup>379</sup> 11 pieces

Fortress on Lokrum 1 piece

Bunker in the pine forest 1 piece

The forest at Srd 2 pieces

Crossroads (underpass) entrance into Dubrovnik 3 pieces

The window on the right tower (PAT 20mm or PAM) 1 piece

Towards the hotel Libertas 1 piece

The plateau left above the hospital 2 pieces

RKZ M72<sup>380</sup> 26 pieces BST

The bunker in the pine forest 2 pieces

The basement of the building left of the bunker 1 piece

The corner at the entrance to the Old Town (left one) 3 pieces

(The barrel of the cannon noticed 7 days ago)

The fish market at the entrance to the Old Town 4 pieces

(The carrying in and out of crates was noticed)

The forest above the road towards Srd 5 pieces

The tunnel near the Lovrijenac fortress 5 pieces

The entrance to the right fortress 2 pieces

(the rocket entered the window)

Towards the plateau right of Libertas 2 pieces

(an activity of 4 MB/mortars/noticed)

The underpass at the entrance to Dubrovnik 2 pieces

129. The statement of the task assigned to the anti-armour company should not pass unnoticed. It reveals that firing on the city of Dubrovnik, as distinct from Srd, was expressly contemplated as a necessary function of the artillery support in the battle plan for the assault on Srd. The Chamber observes that while the phrase "targets in the town" does not appear to mean the Old Town, as distinct from the rest of Dubrovnik residential area, neither is the Old Town excluded from the scope of the targets. Further, the Chamber notes that the task of the anti-armour company at Žarkovica was to target potential threats to the JNA units on Srd, both threats from the southern slopes of Srd and from the town. In carrying out this order, the recoilless cannons RKZ M72 are recorded in Captain Nešić's report as having fired nearly two and a half times the number of shots as the Maljutka 9K11 rockets. Many of the targets identified for the recoilless cannons and the Maljutkas in this effort were in or beyond the Old Town.

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<sup>377</sup> Captain Nešić, T 8235.

<sup>378</sup> Exhibit D113. Captain Nešić, T 8188-8189.

130. The Chamber heard expert evidence that the recoilless cannons had not sufficient range to target the Old Town from Žarkovica.<sup>381</sup> If that was correct it would obviously call into question the honesty and reliability of the report of Captain Nešić. A number of factors persuade the Chamber to find, as it does, that the recoilless cannons at Žarkovica could target at least parts of the Old Town. First, the Croatian forces had no tanks or other conventional armour in Dubrovnik. From Žarkovica, there were, therefore, only three potential targets, Bosanka, Srđ and Dubrovnik (including the Old Town). Bosanka was occupied by the JNA. Srđ is approximately the same distance from Žarkovica as the far (west-northwest) side of the Old Town. In the Chamber's finding, therefore, the only reason for siteing a battery of six recoilless guns in Žarkovica was to be able to target Srđ and Dubrovnik (including the Old Town). The powerful inference is that the recoilless cannons had the range to target at least the nearer parts of Dubrovnik. This includes the Old Town, and Srđ. Secondly, other witnesses describe the use of recoilless cannons against targets in the Old Town that day.<sup>382</sup> Thirdly, the evidence of the expert on this point, while rather emphatically stated at the outset, when he was being pressed in cross-examination about assumptions he had made in forming his expert opinion, was later modified and much more cautiously expressed. The Chamber was left with the firm understanding that, at least when not being used against armour, the effective range of the recoilless cannon was greater than he first indicated.

131. The said expert, Janko Viličić, first stated that the 82 mm recoilless gun was designed as an anti-armour weapon and intended for targets up to 600 metres and exceptionally up to 1,000 metres.<sup>383</sup> His testimony was that the *effective* range, *i.e.* apparently against armour, of the reactive M72 shell is 1,000 metres.<sup>384</sup> The expert was also of the view that for any range beyond 1,000 metres the gun did not have a sight.<sup>385</sup> However, during re-examination he recalled that new sights had been developed for ranges up to 2,000 metres, but he added that at this range the precision of the sight was reduced.<sup>386</sup> He pointed out that the recoilless gun was an anti-armour weapon with cumulative shells intended to pierce armour. The expert thus seems to distinguish the effective range, within which the gun can pierce armour, from the range within which the sight can be used. Further, according to the expert, even targets beyond the range of the sight could be reached, but with the use of firing tables and quadrants for effective sighting.<sup>387</sup> Turning to the particular

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<sup>379</sup> The Chamber notes that this refers to the Maljutka rockets.

<sup>380</sup> The Chamber notes that this refers to the recoilless cannons.

<sup>381</sup> Janko Viličić said that firing would be possible but not through a sight, T 8428-8431.

<sup>382</sup> Witness B, T 5037, Captain Nešić, T 8238.

<sup>383</sup> Janko Viličić, T 8428.

<sup>384</sup> Janko Viličić, T 8429.

<sup>385</sup> Janko Viličić, T 8428.

<sup>386</sup> Janko Viličić, T 8498.

<sup>387</sup> Janko Viličić, T 8428-8429.

circumstances of the present case, the expert testified that projectiles from the recoilless guns deployed by the unit of Captain Nešić could reach targets in the Old Town, but not using the sight.<sup>388</sup> The near side of the Old Town is some 2,300 metres from Žarkovica. In view of the expert's testimony, the Chamber finds that the recoilless guns positioned on Žarkovica could target at least the near areas of the Old Town and Srd. The general tenor of the evidence indicates, however, that the weapon was limited in its ultimate range so that it is probable that it could not target the far side of the Old Town. Purported targets noted in Captain Nešić's report, such as Fort Lovrijenac and the plateau near Hotel Libertas, were, in the finding of the Chamber, beyond the range of those cannons. The Chamber would also record its finding that some purported targets noted by Captain Nešić for the Maljutka rockets were beyond the range of that weapon *e.g.* Hotel Libertas. The range of the Maljutka is in the vicinity of 3,000 metres,<sup>389</sup> whereas Hotel Libertas is some 5,000 metres from Žarkovica.

132. That having been said, there are other reasons for reservation about the accuracy and reliability of Captain Nešić's report of 8 December 1991. It was prepared at a time when the Captain well knew that the shelling of the Old Town was being "investigated" by Admiral Jokić. It was prepared for that investigation. It is apparent from the evidence of Captain Nešić that there was no system in place on 6 December 1991 for recording the number of shells or rockets fired that day, or for recording the targets as each was fired.<sup>390</sup> Despite this, the report purports to identify a precise number of rockets, 11, and cannon shells, 26, which were used, everyone of the targets that were fired on, and the number of rockets or shells expended on each target. Further, the Chamber observes that the targets identified in the report each had some apparent military justification. None of the identified targets was a vessel, notwithstanding filmed evidence of Maljutka rockets, which could only have come from Žarkovica, hitting a number of vessels in the harbour of the Old Town that morning.<sup>391</sup> No identified rocket target was inside the walls of the Old Town despite the evidence of rockets landing within the Old Town that day. The Chamber observes, in addition, that the total number of rockets and shells reported to have been used is surprisingly small, especially having regard to the length of the engagement that day and the number of weapons at Žarkovica. In short, the report seeks to demonstrate that there was only a limited amount of controlled shooting, all of it at justified military targets. Its effect is to indicate that the considerable destruction of property in the Old Town could not have been caused by the weapons and rockets at Žarkovica. There is a considerable, varied and strong body of evidence to the contrary. The Chamber is unable

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<sup>388</sup> Janko Viličić, T 8430.

<sup>389</sup> Exhibit P184, p 12.

<sup>390</sup> Captain Nešić, T 8245.

<sup>391</sup> Exhibit P66 (at 31:48), Exhibit P78 (at 12.08).

to accept the report by Captain Nešić of 8 December 1991 as accurate and reliable. It was deliberately contrived.

133. By way of marked contrast to the evidence of Captain Nešić, there is the evidence of Witness B, a JNA soldier at Žarkovica that day, who was responsible for carrying Maljutka rockets between the trucks and the store room on Žarkovica, or directly to the firing positions themselves.<sup>392</sup> His evidence is that while the artillery attack from Žarkovica initially targeted Srd, once the JNA infantry set out, the attack was directed towards Dubrovnik:<sup>393</sup> “The Old Town, the New Town, and that island on the left-hand side”<sup>394</sup> *i.e.* Lokrum. Witness B testified that two or three times during the day for between five and ten minutes at a time, he was able to observe what was happening in the city of Dubrovnik below, from a vantage point on Žarkovica directly facing the Old Town.<sup>395</sup> He observed shells falling on the Old Town:

I saw that the shells were falling directly into the Old Town and on the ships and on the island of Lokrum and into the water in front of the ships. [...] What I remember most clearly is when one of the rockets fell straight through a window, if I may call it that, in the Old Town [...] It was a window on that Old Town, on the walls. [...] Rockets were flying over the Old Town, depending on how good the operators where in terms of hitting their targets.<sup>396</sup>

It was the evidence of Witness B that over 100 Maljutka missiles alone, *i.e.* not including the cannons, were fired from Žarkovica that day.<sup>397</sup> He testified that the firing only stopped around 1500 hours on 6 December 1991, which is consistent with the experience of those in the Old Town.<sup>398</sup>

134. Witness B’s account describes a scene of often indiscriminate firing, with soldiers often firing at will at targets of their choosing in Dubrovnik, including the Old Town. He testified that no targets were identified that day<sup>399</sup>, that the officers on Žarkovica never ordered that Maljutkas should not be fired on the Old Town,<sup>400</sup> that the Maljutka operators were engaging in a kind of competition, setting themselves targets and celebrating a successful hit.<sup>401</sup> Witness B’s evidence was that even those who were not trained in handling a Maljutka were encouraged to participate in the firing, including Witness B himself, although he declined the offer.<sup>402</sup> On Witness B’s evidence, during this period, Captain Kovačević remained for the most part with the Maljutka

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<sup>392</sup> Witness B, T 5037-5038; T 5042.

<sup>393</sup> Witness B, T 5037.

<sup>394</sup> Witness B, T 5037.

<sup>395</sup> Witness B, T 5043; Exhibit P154.

<sup>396</sup> Witness B, T 5043-5044.

<sup>397</sup> Witness B, T 5053.

<sup>398</sup> Witness B, T 5052-5053.

<sup>399</sup> Witness B, T 5046.

<sup>400</sup> Witness B, T 5049.

<sup>401</sup> Witness B, T 5046.

<sup>402</sup> Witness B, T 5046; T 5049-5051.

operators, although he spent some time with the recoilless cannons.<sup>403</sup> Captain Kovačević appeared to be furious, shouting all the time. He even fired up to ten of the Maljutka missiles himself.<sup>404</sup> Witness B recalled hearing Captain Kovačević give orders that day, in particular it was his evidence that he heard him say on one occasion (around 1000 or 1100 hours) “Everything should be razed to the ground”.<sup>405</sup> Captain Kovačević gave no orders about the amount of fire that should be levelled at the area: “There was no limitation imposed. The main thing was to keep firing.”<sup>406</sup>

135. Captain Pepić, also stationed at his observation post on Žarkovica that day, contradicted the evidence of Witness B in a number of respects. His evidence was that there was no indiscriminate firing, the JNA artillery fire that day was targeted at Croatian firing positions. He outlined in some detail Croatian firing positions that he claimed he had observed, both inside the Old Town and in the wider city of Dubrovnik. In contrast to other evidence and the Chamber’s finding, Captain Pepić’s evidence is that shelling started from Žarkovica after 0800 hours, although the “activity” had started earlier at 0600 hours. He first observed targets at 0800 hours.<sup>407</sup> In some other respects, however, his evidence has some general consistency with the evidence of those in the Old Town. In some respects his evidence is not consistent with that of Captain Nešić. Captain Pepić described the scene in the Old Town that day from his vantage point overlooking it. He saw clouds of thick black smoke rising from the Old Town. He saw boats in the harbour burning. He saw that parts of the roofs in the Old Town had caved in or collapsed. He saw roof tiles and other debris littering the Stradun and in the streets of the Old Town. Towards dark, when Captain Pepić left Žarkovica (around 1600 – 1630 hours) he saw buildings in the Old Town burning, and debris and scattered stones and tiles in the street.<sup>408</sup>

136. Captain Drljan, who in late 1991 served as an operations officer in charge of planning at the operations and training department of the 9 VPS,<sup>409</sup> also spent some time on Žarkovica that day. It was his evidence that, directly upon arriving at the forward command post in Kupari around 0700 hours on 6 December 1991, he received a telephone call from Warship-Captain Zec. Warship-Captain Zec ordered Captain Drljan to convey to Captain Kovačević, at Žarkovica, on orders from the commander, Admiral Jokić, that he must not fire on the Old Town.<sup>410</sup> Captain Drljan took his time in complying with this order. He first had breakfast, although he suggested he had done so “in

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<sup>403</sup> Witness B, T 5051.

<sup>404</sup> Witness B, T 5051.

<sup>405</sup> Witness B, T 5052.

<sup>406</sup> Witness B, T 5052; in this respect, *see also*, Captain Negodić, T 5266-5267.

<sup>407</sup> Captain Pepić, T 7542-7545.

<sup>408</sup> Captain Pepić, T 7535-7541.

<sup>409</sup> Captain Drljan, T 7685.

<sup>410</sup> Captain Drljan, T 7698-7701.

a hurry".<sup>411</sup> He said he arrived at Žarkovica around 0800 hours. Firing was ongoing. He found Captain Kovačević in a bunker, wearing a pair of headsets and issuing orders to his units. Captain Drljan conveyed the order to Captain Kovačević who gestured that he had understood.<sup>412</sup> Captain Drljan remained on Žarkovica for about an hour after seeing Captain Kovačević.<sup>413</sup> An element of his evidence which the Chamber found to be surprising, and indicative of the weight attached by both Captain Kovačević and Captain Drljan to this order, if there was such order, is that while Captain Drljan was at Žarkovica he observed a shell fired at the Old Town, *i.e.* a clear breach of the order. Yet he did nothing about it, either by confronting Captain Kovačević or reporting it to Admiral Jokić or Warship-Captain Zec.<sup>414</sup> His explanation was that he had complied with his orders by delivering Warship-Captain Zec's order, and he had no authority to do more. He said he did not know the whereabouts of Warship-Captain Zec or Admiral Jokić, although Warship-Captain Zec was not at Žarkovica, so he did not try to contact them.<sup>415</sup> Neither did he make a written report. His explanation for this is that it was not his job as he was not the duty officer.<sup>416</sup> The Chamber also notes that while the evidence as to the arrival times of Captain Drljan and Warship-Captain Zec at Žarkovica that day is no doubt imprecise, and it accepts that Warship-Captain Zec arrived later than Captain Drljan, nevertheless they must have been at Žarkovica together for some period. From where Captain Drljan was standing he was able to see the advance of the JNA troops towards Srđ. He observed that Srđ was coming under heavy artillery bombardment, although he suggested that he could not identify the source of the firing.<sup>417</sup> As for the Old Town, he saw several fires inside the Old Town, one of which was on the Stradun.<sup>418</sup> Captain Drljan returned to Žarkovica later that day around 1400 hours.<sup>419</sup> Smoke was still rising from several different sites in the Old Town.<sup>420</sup> Captain Drljan heard that Captain Kovačević was preparing to withdraw his troops from Srđ. Captain Kovačević was issuing orders for tanks to encircle Srđ and provide protection for the retreating JNA troops. At this time, there was still firing at Srđ, but it was not of the same intensity as earlier.<sup>421</sup>

137. As for the artillery support from the 130mm howitzers at Čilipi, the Chamber finds that it is not proved that the guns located at Čilipi airport fired that day. The general body of evidence is that they did not fire. That is so for both the 130mm battery and the smaller 85mm battery. Captain

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<sup>411</sup> Captain Drljan, T 7701.

<sup>412</sup> Captain Drljan, T 7701-7702.

<sup>413</sup> Captain Drljan, T 7703.

<sup>414</sup> Captain Drljan, T 7727-7729.

<sup>415</sup> Captain Drljan, T 7728-7729.

<sup>416</sup> Captain Drljan, T 7740.

<sup>417</sup> Captain Drljan, T 7703-7704.

<sup>418</sup> Captain Drljan, T 7704-7705.

<sup>419</sup> Captain Drljan, T 7717.

<sup>420</sup> Captain Drljan, T 7718.

<sup>421</sup> Captain Drljan, T 7718.

Pepić was serving with the 107 OAG as commander of the 130mm howitzer battery on 6 December. He had been ordered the previous evening to be at Žarkovica to convey targeting information to his battery as ordered by Captain Kovačević. Captain Pepić in his evidence confirmed that at 0800 hours he was given an order by Captain Kovačević to fire upon the Croatian mortar positions on the tennis courts near the Libertas Hotel. This firing position had been identified by Captain Nešić. It was said in evidence that only Captain Pepić's battery had those targets in range, but the Chamber finds to the contrary. Captain Pepić immediately communicated this order to his battery at Čilipi over the radio.<sup>422</sup> It is Captain Pepić's evidence that, despite this, fire was never opened by his battery. Branimir Lukić, Captain Pepić's deputy commander reportedly responded that the order to open fire had not been approved. There were several other requests for fire from Captain Kovačević, but it is Captain Pepić's evidence that his unit never opened fire as requested.<sup>423</sup> Captain Pepić understood initially that it was his immediate commander, Lieutenant-Colonel Stamenov, who overruled the orders each time.<sup>424</sup> Captain Pepić later learned that the order not to fire came through Lieutenant-Colonel Stamenov directly from the command of the 9 VPS, *i.e.* Admiral Jokić, who remained abreast of the situation throughout the day.<sup>425</sup> Captain Nešić advanced the opinion in his evidence that the attack on Srd was halted because of the lack of artillery support from the 130mm howitzers at Čilipi. Without these guns, he said, it was not possible to neutralise the firing positions directing fire against Mount Srd and causing casualties among the JNA troops.<sup>426</sup>

138. In the Chamber's finding this is only partly true. Captain Kovačević had mortars under his command especially at Uškoplje and Strinčijera which, between them, were able to target the whole of Dubrovnik. In addition, the mortars of the 3/5 mtbr at Osojnik could also target the suburbs of Dubrovnik to the northwest of the Old Town where the main Croatian firing positions were located. Despite the denials in evidence of the Commander of the 3/5 mtbr, Lieutenant-Colonel Jovanović, which denials were contradicted by his own contemporary report and messages, the Chamber finds the mortars of the 3/5 mtbr were used at times on 6 December 1991 against these Croatian firing positions, including the Libertas Hotel. The howitzers at Čilipi had greater destructive capacity and accuracy than the mortars, but if properly directed, the JNA mortars should have been able to make an impact on the relatively few Croatian firing positions.

139. The truth seems to be, in the finding of the Chamber, that there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired

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<sup>422</sup> Captain Pepić, T 7484-7485.

<sup>423</sup> Captain Pepić, T 7484-7485 ; T 7582-7583. See also Captain Nešić, T 8182-8183.

<sup>424</sup> Captain Pepić, T 7581-7582.

<sup>425</sup> Captain Pepić, T 7583-7584.

extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town. Hence, the few Croatian artillery weapons were able to continue to fire and to concentrate their fire on Srd, where the few remaining Croatian defenders were underground and the JNA attackers were exposed. After some 6 hours of this fire it clearly became apparent to Captain Kovačević that his attacking force could not overcome the defenders and break the impasse. They were tired and affected by the cold conditions. The longer they stayed at Srd, the greater the prospect that they would fall to the Croatian fire. So Captain Kovačević ordered their withdrawal<sup>427</sup> at some time between 1400 and 1500 hours. Captain Drljan's evidence was that at about 1400 hours Captain Kovačević was issuing orders for tanks to be prepared for the protection of the troops withdrawing from Srd.<sup>428</sup> In his testimony, Captain Nešić referred to orders for the units to withdraw.<sup>429</sup>

140. According to the report of Admiral Jokić, at 1435 hours it was decided to retreat the unit approaching Srd and redeploy it to the original positions.<sup>430</sup> The following entries of the 9 VPS war diary refer to messages from and to the JNA attacking troops from 9 VPS command concerning the abandonment of the attack on Srd by the JNA:

1400 Captain Kovačević: is thinking of withdrawing back his men since they are already exhausted, it is cold. He was ordered to decide for himself what must be done. ...

1445 Kovačević: He cannot sustain on Srd, must pull out men out of several reasons. He was warned to withdraw the men in an organised fashion and to mind the mortars. I gave my approval. ...

1520 Kovačević: withdrew men to Strincijera, acting with MB 120 on Srd.<sup>431</sup>

The 1520 hours entry indicates that JNA 120mm mortar fire was again directed at Srd as the JNA troops withdrew, no doubt to restrict the activities of the Croatian defenders as the JNA retreated. The entries for 1400 and 1445 hours confirm, in the Chamber's finding, that the JNA troops at Srd continued to be under 9 VPS direction during the attack.

141. Captain Stojanović, with his smaller attacking force, stated that, in view of the lack of artillery support and the losses his unit had sustained, he himself decided to leave his position and get his soldiers out.<sup>432</sup> It was his evidence that his withdrawal to Bosanka was completed at around 1300 hours or 1400 hours,<sup>433</sup> although the times were merely a matter of impression and the general

<sup>426</sup> Captain Nešić, T 8185.

<sup>427</sup> Lieutenant Lemal, T 7375-7376.

<sup>428</sup> Captain Drljan, T 7718.

<sup>429</sup> Captain Nešić, T 8185.

<sup>430</sup> Exhibit D65.

<sup>431</sup> Exhibit D96.

<sup>432</sup> Lieutenant-Colonel Stojanović, T 7832-7833.

<sup>433</sup> Lieutenant-Colonel Stojanović, T 7832-7833.

body of evidence suggests that the actual time was after 1400 hours. Slobodan Novakovic said that by 1540 hours, when he arrived at Bosanka, everything was over and the soldiers from Srđ were already in Bosanka.<sup>434</sup>

142. A meeting was held in Bosanka shortly after the withdrawal of the JNA troops from Srđ. Captain Drljan who attended the meeting, heard complaints from the troops that they had not been given the support from the 130mm howitzers that had been agreed to the previous day. In their minds, it was Admiral Jokić who had denied them this crucial support.<sup>435</sup> Later that evening, Lieutenant Lemal's unit was visited by one of the senior officers of the 9 VPS. The men protested that they had received no artillery support and that the unit had incurred casualties as a result. Lieutenant Lemal said in his evidence that he had been dependent on artillery support, as Croatian firing positions in Babin Kuk and Lokrum were outside the range of his weapons.<sup>436</sup> There were, however, the 82mm mortars of the company he commanded at Strinčijera. Indeed, in his evidence, Lieutenant Lemal blamed the lack of artillery support from the guns at Čilipi for the casualties his unit suffered on 6 December 1991.<sup>437</sup> As indicated earlier, in the Chamber's finding this may be a convenient explanation for the defeat, but it is not justified by the facts.<sup>438</sup>

143. In addition to the JNA mortar fire that came from Strinčijera and Uškoplje and fire from Žarkovica, as indicated earlier, at least the 120mm mortars of the 3/5 mtbr also fired upon Croatian firing positions and other targets in the city of Dubrovnik and its environs. Between 0600 and 0700 hours Captain Kovačević informed Lieutenant-Colonel Jovanović that his troops were the subject of Croatian fire. Captain Kovačević requested the support of both the 130mm howitzers at Čilipi and the fire support of the 120mm mortars of the 3/5 mtbr. Lieutenant-Colonel Jovanović went directly to his observation post from where he ordered that fire be opened by his mortars on visible targets in the Lazaret and Nuncijata area.<sup>439</sup> The weapons in his unit which were deployed on 6 December were located south of Osojnik, *i.e.*, in the Greblje sector. Lieutenant-Colonel Jovanović's evidence was that the maximum range of his weapons would have been the northern slope of Babin Kuk and Srđ, that is Nuncijata, Sustjepan, the left bank of Rijeka Dubravačka [*i.e.* well short of the Old Town].<sup>440</sup> In response to Captain Kovačević's first request, Lieutenant-Colonel Jovanović said that he opened quite intensive fire on targets in Lazaret, Hotel Neptune and Nuncijata, as well as

<sup>434</sup> Slobodan Novaković, T 6836, 6874.

<sup>435</sup> Captain Drljan, T 7718-7719. See also the testimony of Slobodan Novakovic who witnessed the meeting of the soldiers and Captain Drljan. The soldiers acted angrily and insulted Captain Zec and Admiral Jokić when they were told they had to give up the attack on Mount Srđ, T 6831-6834.

<sup>436</sup> Lieutenant Lemal, T 7377-7378.

<sup>437</sup> Lieutenant Lemal, T 7463-7465.

<sup>438</sup> See *supra*, paras 131; 138-139.

<sup>439</sup> Lieutenant-Colonel Jovanović, T 8082-8083.

<sup>440</sup> Lieutenant-Colonel Jovanović, T 8082-8083.

Sustjepan between 0745 and 0830 hours.<sup>441</sup> Around 0900 hours Captain Kovačević contacted Lieutenant-Colonel Jovanović a second time, asking for urgent support to be directed at Lazaret, Nuncijata and Hotel Libertas. Captain Kovačević indicated that his troops on Srd were under heavy fire from Hotel Libertas and were suffering casualties as a result.<sup>442</sup> A second round of quite intensive firing took place between 0915 and 1155 hours directed, according to Lieutenant-Colonel Jovanović's evidence, against targets within range in Lazaret and Nuncijata.<sup>443</sup> In his testimony, however, Lieutenant-Colonel Jovanović denied that he directed fire from his units against targets near the Hotel Libertas, as had been requested by Captain Kovačević.<sup>444</sup> He said that Hotel Libertas was not in range, but the Chamber finds this was not the case given the evidence it has as to the range of these mortars<sup>445</sup> and Lieutenant-Colonel Jovanović's reports of his actual targets at the time. The 9 VPS war diary contains a reference at 1015-1020 to a report of the 3/5 mtbr firing 27 120mm (mortar) shells of which 12 120mm shells were on Libertas.<sup>446</sup> Lieutenant-Colonel Jovanović's written report also refers to the unit having acted on the region of Hotel Libertas.<sup>447</sup> The Chamber finds that the region of the Hotel Libertas was within range of the mortars of the 3/5 mtbr in Osojnik, although near the limit of that range, and that they fired on this position. The Chamber does observe, however, that the tennis courts in the vicinity of the Hotel Libertas were in a depression and would not have been able to be directly observed by Lieutenant-Colonel Jovanović.<sup>448</sup> Of course that is not unusual for mortar firing. His evidence is that he reported to the forward command post at Kupari in relation to both of these actions.<sup>449</sup> The so-called war diary confirms this account.<sup>450</sup>

144. There are two additional entries in the war diary for 6 December 1991 referring to actions taken by Lieutenant-Colonel Jovanović's unit that day. The entry at 1500 hours purports to be a comment from Captain Baraković and reads: "3/5 pmnbr is sustaining strong sniper fire from Sustjepan. One senior officer wounded and two vehicles damaged. They were ordered to take the

<sup>441</sup> Exhibit D108, Lieutenant-Colonel Jovanović, T 8082-8083.

<sup>442</sup> Lieutenant-Colonel Jovanović, T 8084-8085.

<sup>443</sup> Lieutenant-Colonel Jovanović, T 8085-8087, Exhibit D108.

<sup>444</sup> Lieutenant-Colonel Jovanović, T 8084-8085 ; T 8123-8129.

<sup>445</sup> Janko Viličić said that the distance from the Greblje sector, where, according to Admiral Jokić the 120mm mortars were positioned (T 4011-4029, Exhibit P132), to Hotel Libertas was 6,150 (or 6,330) meters, which is at the far end of the range of those mortars, T 8402-8404; 8495-8497. It is to be noted that the Croatian position identified at the tennis courts in the vicinity of Hotel Libertas is in fact to the north of the hotel and thus the distance is slightly smaller from that calculated by Janko Viličić. Another expert, Jožef Poje, wrote in his report that the range of a 120mm mortar with active-reactive shells is 9,000 meters, while with LTF shells it is 6,400 meters, Exhibit P184. In court he testified that the range of such a mortar with a light shell is 6,000 meters, T 6412-6415.

<sup>446</sup> Exhibit D96.

<sup>447</sup> Exhibit D108, para 4.

<sup>448</sup> Exhibit C1/1, p 12.

<sup>449</sup> Lieutenant-Colonel Jovanović, T 8084-8087. In relation to the second action, he testified that he had sought guidance from the operations centre in Kupari as to whether he should continue beyond 1200 hours in light of Captain Zec's order the previous evening that all activities should be terminated by 1200 hours. He was notified that the ceasefire should be honoured, T 8085-8087.

men to cover. Lieutenant-Colonel Jovanović has ordered the same. He is ordering that MB (mortar) 120mm is to fire on the military targets with the purpose of protecting the people".<sup>451</sup> Despite this, in his testimony, Lieutenant-Colonel Jovanović also denied that his troops were firing at this time.<sup>452</sup> The second entry, at 1627 hours reads as follows: "3/5 ptmbr from 1545 – 1615 it has acted with MB 120mm on Sustjepan from which it has suffered strong and focused sniper fire. At 1615 hours he stopped the action." Lieutenant-Colonel Jovanović testified that he was at the command post in Kupari writing his report on the events of the day when the information came from Captain Baraković about sniper fire. He said that, having heard the information about firing, he had requested his troops to make preparations, but it was only once he had returned to the unit, having written his report, that they opened fire on the targets.<sup>453</sup>

145. As indicated earlier, the Chamber also had reason for reservation about the evidence of Lieutenant-Colonel Jovanović about events at the meeting at the 9 VPS command post at Kupari on 5 December 1991.<sup>454</sup> With respect to his evidence concerning the use of the mortars under his command, the Chamber has found, contrary to his denials, that these mortars did fire on the region of the Hotel Libertas as requested by Captain Kovačević, and did so more than once on 6 December 1991. It is apparent, however, that these attempts were limited in duration. No doubt other targets were preferred. Even though there was direct communication between Captain Kovačević, at an excellent observation position at Žarkovica, and Lieutenant-Colonel Jovanović, it is apparent from the evidence that the latter was more concerned to fire at targets with no relevance to directly supporting the attacks on Srd, but which were of interest to the 3/5 mtbr's area of responsibility, including Sustjepan.<sup>455</sup> With respect to his choice of targets in Dubrovnik, the Chamber also notes the view of Lieutenant-Colonel Jovanović that, as the Dubrovnik warning siren had sounded early in the attack, the civilian population could be expected to have taken shelter, so that any movement observed in Dubrovnik could be taken to be a Croatian defender and therefore a legitimate military target.<sup>456</sup>

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<sup>450</sup> Admitted as Exhibit D96.

<sup>451</sup> Exhibit D96.

<sup>452</sup> Lieutenant-Colonel Jovanović, T 8139.

<sup>453</sup> Lieutenant-Colonel Jovanović, T 8140-8141.

<sup>454</sup> See *supra* paras 88; 98.

<sup>455</sup> In particular, according to the 9 VPS OC war diary, on 4 December 1991 the commander of the 3/5 mtbr informed the 9 VPS OC that his unit was fired upon from small arms in the area of Sustjepan, that it was at the same time under 82mm mortar fire and also under 12.7 mm mortar fire from the direction of Nuncijata. The war diary also shows that on 5 December 1991, the 3/472 mtbr was under Croatian fire from Srd, but the commander was advised by the 9 VPS OC to restrain from any action unless the fire from Srd endangered the life of his soldiers. During the night the Croatians opened sporadic fire from small arms, but received no fire-response by the JNA, Exhibit D96, pp 60-61; 66-67.

<sup>456</sup> Exhibit D108.

**E. The role of the Accused - interrelationship of the Accused, Admiral Jokić and General Kadijević**

146. It was the evidence of Admiral Jokić that he was telephoned at about 0700 hours on 6 December 1991 by the Accused who said he had just received a telephone call from the Federal Secretary of Defence, General Kadijević or his Chief of Staff.<sup>457</sup> On his account General Kadijević in Belgrade had been contacted by a representative of the European Community to protest about the artillery attack on Dubrovnik.<sup>458</sup> The evidence of Admiral Jokić was that he was surprised to hear that Dubrovnik was being attacked. He said he told the Accused that the commander of the 3/472 mtbr was about to launch an attack on Srd as he had come under heavy fire.<sup>459</sup> This evidence is consistent with other evidence of Admiral Jokić that he had been woken before dawn to be told that Captain Kovačević had reported provocations during the night by Croatian forces at Srd<sup>460</sup> and, after a second report, that Captain Kovačević had decided to attack Srd.<sup>461</sup> It was the Admiral's evidence that the Accused told him that General Kadijević was furious as this attack had come after a ceasefire agreement had been reached, to which Admiral Jokić replied that he would look into the matter and would stop the attack.<sup>462</sup> It is the evidence of Admiral Jokić that he informed the Accused that what was under way was the sending of the Chief of Staff Warship-Captain Zec to the observation post of Captain Kovačević the commander of the 3/472 mtbr, that he would also send Lieutenant-Colonel Gavro Kovačević who was in charge of that unit there, and that he believed that the two of them would be able to resolve the situation in the fastest possible way.<sup>463</sup> The Admiral said that the Accused agreed with these measures.<sup>464</sup> Admiral Jokić also said that in this conversation the Accused ordered him to have the attack stopped<sup>465</sup> and conveyed to him an order of General Kadijević that both Admiral Jokić and the Accused should come to Belgrade for consultation as soon as they dealt with the situation.<sup>466</sup> As will be discussed the Chamber has reservations about aspects of this evidence. It will examine it with close attention.

147. The Accused did not give evidence. Neither, of course, did General Kadijević. There is therefore no denial of the evidence of Admiral Jokić about the fact of this telephone conversation, and its content. Nevertheless, the Defence has led evidence to suggest this conversation could not

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<sup>457</sup> Admiral Jokić, T 4046.

<sup>458</sup> Admiral Jokić, T 4050.

<sup>459</sup> Admiral Jokić, T 4046.

<sup>460</sup> Admiral Jokić, T 4041.

<sup>461</sup> Admiral Jokić, T 4043.

<sup>462</sup> Admiral Jokić, T 4046-4047.

<sup>463</sup> Admiral Jokić, T 4052.

<sup>464</sup> Admiral Jokić, T 4052.

<sup>465</sup> Admiral Jokić, T 4052.

<sup>466</sup> Admiral Jokić, T 4047.

have occurred and that the Accused knew nothing of the attack on Srđ and the shelling of Dubrovnik until information from the 9 VPS was received by the 2 OG mid-afternoon of the 6 December 1991.<sup>467</sup> A defence witness, JNA officer Frigate-Captain Handžijev, testified that at sometime before midday on 6 December 1991, while he was on duty at the operations centre at Kumbor, General Kadijević called and asked to speak to Admiral Jokić. Having connected them, it is the evidence of Frigate-Captain Handžijev that he then listened to their conversation.<sup>468</sup> He testified that he heard General Kadijević ask Admiral Jokić what was happening, to which the Admiral responded in a rather confused manner that he was just carrying out a tactical movement of units.<sup>469</sup> Frigate-Captain Handžijev further testified that he had not received and put through to Admiral Jokić any phone call that morning from the command of the 2 OG.<sup>470</sup> This evidence is inconsistent, of course, with Admiral Jokić's account of a telephone conversation between the Accused and Admiral Jokić at around 0700 hours, and with Admiral Jokić's evidence as to the content of that conversation. The evidence of Frigate-Captain Handžijev about these matters was directly rejected by Admiral Jokić, in rebuttal, as untrue and suspicious.<sup>471</sup>

148. The Chamber finds itself unable to accept the evidence of Frigate-Captain Handžijev in these respects. First, as a matter of credibility, and after making allowance for the effects of the lapse of years between December 1991 and Frigate-Captain Handžijev giving evidence in 2004, the Chamber concluded that he was an entirely unsatisfactory witness. The Chamber gained the clear impression that he was very uneasy and uncomfortable about his testimony. Secondly, the heart of his evidence requires acceptance of the suggestion of Frigate-Captain Handžijev that, as a relatively junior duty officer, he was prepared to eavesdrop on a telephone conversation between his Admiral and the Federal Secretary of Defence. Thirdly, the Chamber is unable to accept that he would have, in 2004, the detailed recollection he claimed to have of elements of this conversation and these events in December 1991, when it was made very clear by cross-examination that he had no, or virtually no, recollection of any other events of 6 December 1991, or of events immediately before or after that day.<sup>472</sup> Further, with respect to his evidence that there had been no call from the command of the 2 OG that day, he did accept that at times he left the operations room for a few minutes.<sup>473</sup> And with respect to the supposed conversation between Admiral Jokić and General Kadijević, the Chamber notes that Frigate-Captain Handžijev was very vague as to the time of the

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<sup>467</sup> Colonel Svičević, T 7106-7107; 7216.

<sup>468</sup> Frigate-Captain Handžijev, T 7594.

<sup>469</sup> Frigate-Captain Handžijev, T 7594; 7697; 7666-7667.

<sup>470</sup> Frigate-Captain Handžijev, T 7595.

<sup>471</sup> Admiral Jokić, T 8563.

<sup>472</sup> In particular, Frigate-Captain Handžijev testified that he did not remember receiving an order to call Lieutenant-Colonel Kovačević and instruct him to come to Kupari, as recorded in the Kupari logbook at 1349 hours on 6 December 1991, T 7639-7640. Frigate-Captain Handžijev also stated that he is unable to recall what conversations, messages or information he was dealing with on 4, 5 and 7 December 1991, T 7632-7633.

call, but suggested that it was perhaps 1000-1100 hours<sup>474</sup> and purported only to recall aspects of the conversation. In particular he did not mention any conversation about an order to visit Belgrade, a ceasefire, or an order to stop the attack.

149. There is also evidence of Colonel Svičević, a senior staff officer of the Accused at the 2 OG who expressly denied that the staff of the 2 OG had any knowledge of an attack on Srđ or of shelling on Dubrovnik, including the Old Town, until the receipt of information from 9 VPS mid-afternoon on 6 December 1991, in which there was a brief and general reference to these matters.<sup>475</sup> Colonel Svičević, who then held the post of liaison officer in the headquarters of the 2 OG<sup>476</sup> went even further. In his evidence, he was present at a meeting that day between the Accused and Colm Doyle at the headquarters of the 2 OG at Trebinje.<sup>477</sup> Colm Doyle was then an Irish army officer serving as an ECMM monitor with responsibility in Bosnia and Herzegovina.<sup>478</sup> Today, he is the Chief of Staff of the Military Division at the Department of Peacekeeping Operations of the United Nations.<sup>479</sup> This meeting occurred between 1200 and 1230 hours in the finding of the Chamber, although Colonel Svičević thought it was a little earlier.<sup>480</sup> In direct denial of the evidence of Colm Doyle, according to the evidence of Colonel Svičević, there was no discussion of an attack or shelling of Dubrovnik between the Accused and Colm Doyle at that time.<sup>481</sup> Indeed it was the effect of the evidence of Colonel Svičević that neither the Accused nor he knew of those events at Dubrovnik at that time.<sup>482</sup> For reasons which the Chamber discusses in some detail later in this decision, it finds this evidence of Colonel Svičević to be false.<sup>483</sup> In particular, as noted later, the Chamber was not persuaded by Colonel Svičević's attempts to reinterpret his notes.<sup>484</sup> The Chamber accepts contrary evidence and finds, for the reasons given later, that the Accused did discuss the attack at Dubrovnik with Colm Doyle when they met at Trebinje around 1200-1230 hours that day.<sup>485</sup> The Accused initiated the discussion.<sup>486</sup> Colm Doyle had come that day from Bosnia and Herzegovina and had no knowledge of the attack on Dubrovnik when he met the Accused.<sup>487</sup> Further, the Chamber finds that other evidence confirms that Admiral Jokić and the Accused did discuss at least some aspects of the action at Dubrovnik in the course of the morning

<sup>473</sup> Frigate-Captain Handžijev, T 7595.

<sup>474</sup> Frigate-Captain Handžijev, T 7595.

<sup>475</sup> Colonel Svičević, T 7106-7108; 7216.

<sup>476</sup> Colonel Svičević, T 7062.

<sup>477</sup> Colonel Svičević, T 7087-7088.

<sup>478</sup> Colm Doyle, T 1701.

<sup>479</sup> Colm Doyle, T 1700.

<sup>480</sup> Colonel Svičević, T 7098.

<sup>481</sup> Colonel Svičević, T 7100-7101.

<sup>482</sup> Colonel Svičević, T 7100-7101; *see also* Exhibits D92; D93 and D94.

<sup>483</sup> *See infra*, para 163.

<sup>484</sup> *See infra*, para 163.

<sup>485</sup> *See infra*, paras 161-164.

<sup>486</sup> *See infra*, para 162.

and that the Accused and Admiral Jokić knew in the course of the morning that they had been ordered that morning to go together to Belgrade that day to see General Kadijević to discuss the events at Dubrovnik.<sup>488</sup> In view of these significant matters, the Chamber rejects as untrue the attempts by Colonel Svičević to suggest in his evidence that the events in Dubrovnik were unknown at the 2 OG headquarters and by the Accused until mid-afternoon on 6 December 1991.

150. It was also submitted that radio and other logs of the 2 OG and other JNA units indicated that what was occurring at Dubrovnik on 6 December 1991 was not with the knowledge or direction of the 2 OG and the Accused, and that aspects of the evidence of Admiral Jokić about the events of that day were not borne out by these various records.<sup>489</sup> The Chamber is not able to accept this line of submission. In essence, the Chamber is not persuaded that what is recorded in the various radio and other logs or records that are in evidence are by any means a complete record of the relevant events that day. The Chamber finds these to be somewhat haphazardly kept records, inconsistent as to the nature of the information recorded and as to the extent of the detail and the accuracy of what is recorded. Further, some logs or diaries that are most material are not in evidence. It appears they could not be located in the official JNA records.<sup>490</sup> Also it does not appear to be at all surprising that certain matters or events are not mentioned in the records that are in evidence, given their nature and the general contents of the records. In particular, the Chamber observes that it is clear, in its finding, that not all orders or messages (even those of significance) were recorded, neither was there a universal practice of recording in detail what steps were taken to pass on an order or a message, or responses, nor were accurate time records maintained. Further, the Chamber accepts from the evidence that quite independently of the JNA military communications system, which involved both radio and land-line communications and extended to all relevant units on 6 December 1991, and did not suffer failures of communications that day (despite some suggestions in the evidence of possible failures), there was also available the civil telephone and telefax service by which a number of communications material to this case were conducted, even at the most senior level. This civil system had defects and deficiencies at the time, but it was available and was used.<sup>491</sup> There is also the significant issue whether all of the records in evidence can be accepted for truth. As discussed elsewhere<sup>492</sup> some of the JNA records are in the Chamber's finding deliberately contrived to present a false picture.

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<sup>487</sup> Colm Doyle, T 1708-1709; 1716-1717.

<sup>488</sup> Admiral Jokić, T 4047.

<sup>489</sup> Defence Final Brief, paras 666-686.

<sup>490</sup> See Lieutenant-Colonel Đurasić, T 7007; Frigate-Captain Handžijev, T 7629.

<sup>491</sup> Admiral Jokić, T 4682-4684; Colonel Kurđulija, T 7864-7866; 7870; Frigate-Captain Handžijev, T 7641; 7648; 7676.

<sup>492</sup> See *supra*, paras 96-97.

151. It remains the case, however, that there is neither independent confirmation nor direct denial of the evidence of a telephone conversation between the Accused and Admiral Jokić at around 0700 hours. It is clear, however, that at some stage before mid-morning Admiral Jokić knew that he and the Accused were unexpectedly ordered to go to General Kadijević in Belgrade that day. Indeed, the Defence does not deny that the Accused and Admiral Jokić flew to Belgrade that afternoon.<sup>493</sup> The radio log of the Dubrovnik harbour authority records that at 1027 hours Admiral Jokić requested a meeting with Minister Rudolf as early as possible that day because of “pressing official engagements.”<sup>494</sup> Another message at 1145 hours to Minister Rudolf is recorded in which Admiral Jokić proposed that their negotiations be resumed the next day because he was expected in Belgrade at 1400 hours.<sup>495</sup> This same message expressed the apologies of Admiral Jokić for the attack and indicated that General Kadijević had ordered an investigation. The Chamber finds from these that, before 1027 hours on 6 December 1991, Admiral Jokić knew that he and the Accused had been ordered to Belgrade to consult with General Kadijević that afternoon.

152. Some particular aspects of the evidence of Admiral Jokić may be said to be unsatisfactory. While it was the initial evidence of Admiral Jokić that in the telephone conversation with the Accused at around 0700 hours the Accused ordered that the attack be stopped and agreed with the measures Jokić had already taken,<sup>496</sup> at a later point in his evidence he denied that the Accused had said to him or to any subordinate that the activities against the Old Town needed to be stopped.<sup>497</sup> At another point in his evidence, when asked whether on 6 December the Accused had issued an order not to attack the Old Town, Admiral Jokić answered that he did not know of any other order, except for an order of 5 December prohibiting the opening of fire as of 1200 hours on 6 December 1991.<sup>498</sup> The Chamber notes that in each of these cases, however, Admiral Jokić was not accepting that the Accused had given him an order not to attack the Old Town, which is a materially different order from one to stop the attack on Srd.

153. There are difficulties in the way of accepting all of Admiral Jokić’s evidence about his actions that morning. He gave evidence of his reactions and orders he had given when woken to be told, he said, of messages from Captain Kovačević, reporting provocations at Srd, casualties and indicating that he would attack.<sup>499</sup> These reactions and orders were, in the view of the Chamber, strange indeed, and quite out of keeping with the reactions to be expected of a person in the

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<sup>493</sup> Defence Final Brief, para 447.

<sup>494</sup> Minister Rudolf, T 5765; Exhibit P162.

<sup>495</sup> Minister Rudolf, T 5568-5570; Exhibit P162; see also Exhibit P136, which is the same message received by facsimile.

<sup>496</sup> Admiral Jokić, T 4052.

<sup>497</sup> Admiral Jokić, T 4063.

<sup>498</sup> Admiral Jokić, T 4053-4054.

<sup>499</sup> Admiral Jokić, T 4041; 4043.

Admiral's position. He says he was keenly expecting a ceasefire to be concluded that morning to settle the Dubrovnik problem. He had already (he says) issued a ceasefire order to 9 VPS in anticipation of a concluded agreement. In particular, on the evidence of Admiral Jokić, apparently before the 0700 hours telephone conversation, he had dispatched Warship-Captain Zec to Žarkovica to stop the attack immediately,<sup>500</sup> whereas Captain Drljan testified that on 6 December 1991 in Kupari he received a phone call from Warship-Captain Zec, not necessarily before 0700 hours, who ordered him to go to Žarkovica and convey an order from Admiral Jokić to Captain Kovačević not to fire on the Old Town of Dubrovnik,<sup>501</sup> an order quite different from one to stop the attack. Critically, as the Chamber has found earlier in this decision, Warship-Captain Zec did go to Žarkovica but at a time around or after 0800 hours, and rather than acting to stop the attack, or to prevent fire on the Old Town, he remained at Žarkovica throughout the day,<sup>502</sup> as the attack continued and the Old Town was shelled. Admiral Jokić testified that later that morning he had by telephone also ordered Lieutenant-Colonel Đurasić to go to Žarkovica urgently and to stop the attack,<sup>503</sup> whereas Lieutenant-Colonel Đurasić testified that on 6 December, he did not receive an order from Admiral Jokić to go to Žarkovica and did not go there on that day.<sup>504</sup>

154. It is the Admiral's evidence, further, that in the morning of 6 December he had issued orders prohibiting the batteries within range of the Old Town, *i.e.* those at Čilipi, from using their weapons against the Old Town and had arranged to have Captain Kovačević told that he would not receive artillery support.<sup>505</sup> It is the case that the howitzer battery at Čilipi was prevented from opening fire by the Command of the 9 VPS on each occasion that Captain Kovačević required them to fire at targets in Dubrovnik.<sup>506</sup> There is no suggestion in the evidence, however, that any of the mortar batteries received an order from the 9 VPS around 0700 hours, or later that day, to cease fire, or not to fire on the Old Town, except for what appears to have been a ceasefire order given late in the morning, to take effect at 1115 hours, and which led to a temporary reduction in the frequency of shelling at about that time. This is consistent with the evidence of Admiral Jokić that it was the batteries at Čilipi that were prevented from firing and that Captain Kovačević would not receive artillery support.<sup>507</sup> This left Captain Kovačević without restraint, however, on the use of his own mortars, cannons and rockets. No orders were given to 3/5 mtbr prohibiting the use of its mortars.

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<sup>500</sup> Admiral Jokić, T 4064-4065.

<sup>501</sup> Captain Drljan, T 7701; T 7722.

<sup>502</sup> Captain Pepić, T 7484; Admiral Jokić, T 4101.

<sup>503</sup> Admiral Jokić, T 4068.

<sup>504</sup> Lieutenant-Colonel Đurasić, T 6977-6978.

<sup>505</sup> Admiral Jokić, T 4052-4053.

<sup>506</sup> *See supra*, para 137.

<sup>507</sup> Admiral Jokić, T 4052-4053.

155. There remains, however, in the Chamber's view, nothing which denies that there was a telephone conversation at about 0700 hours, whatever its content may have been, and it is clear that Admiral Jokić was aware by mid-morning of matters, which he says he learned during that conversation *e.g.* that he and the Accused were ordered to Belgrade that afternoon. It is also the evidence of Admiral Jokić, that although not noted in earlier statements, he spoke with the Accused more than once during the morning.<sup>508</sup> In the Chamber's finding with respect to this issue, it is the case that at some time before 1027 hours the Accused and Admiral Jokić did speak to each other by telephone. Whether it was at around 0700 hours, or later, or more than once, and what was said between them, are not matters about which the Chamber can make express findings from the evidence of Admiral Jokić *alone*. However, as has just been indicated, other evidence does afford some independent confirmation of some aspects of this evidence of Admiral Jokić.

156. Further confirmation that the Accused and Admiral Jokić did speak to each other at some stage during the morning of 6 December 1991 is provided by a radiogram Minister Rudolf received from the Accused's command at 2 OG at around 1630 hours that day. The radiogram is in the Accused's name. This radiogram includes the statement "On my orders the units ceased fire at 1115 hours ...".<sup>509</sup> As the Chamber has found earlier in this decision there was indeed a temporary reduction in the frequency of shelling on Dubrovnik, including the Old Town, at about that time, although not a complete cessation.<sup>510</sup> Minister Rudolf and Admiral Jokić had, however, only reached an understanding or an agreement for a ceasefire to take effect at 1115 hours (originally 1100 hours) in exchanges between them during the mid-morning.<sup>511</sup> What evidence there is as to the implementation of this by the JNA, which implementation was at best incomplete, indicates the actual order was passed by Admiral Jokić through the 9 VPS but only to some units. There is no indication that a cessation of the attack on Srd was ordered. No such order was received by the attacking infantry units or by 3/5 mtbr. The radiogram in the name of the Accused, but in truth from his command as he was in Belgrade at that time, discloses that the ceasefire order had originated with him. The necessary implication, in the finding of the Chamber, is that following the discussion of a possible ceasefire to take effect at 1115 hours by Minister Rudolf and Admiral Jokić, the Accused and Admiral Jokić discussed it, the Accused approved it, and left it to Admiral Jokić to convey the order. This was in accordance with the standard chain of command structure between 2 OG and 9 VPS and its subsidiary units.

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<sup>508</sup> Admiral Jokić, T 4894.

<sup>509</sup> Exhibit P23 ; Minister Rudolf, T 5603-5604.

<sup>510</sup> *See supra*, para 107.

<sup>511</sup> Minister Rudolf, T 5600-5601.

157. One significance of these matters for the events of 6 December 1991 and the issues in this case, is that, in the finding of the Chamber, there is confirmation that the Accused and Admiral Jokić did converse by telephone during the morning of 6 December 1991. The total effect of the evidence suggests they had more than one conversation. Their conversations were about the attack. The Accused did order a ceasefire from 1115 hours, although he did not order the cessation of the attempt to take Srd. The Accused did convey to Admiral Jokić the order of General Kadijević for both the Accused and Admiral Jokić to consult with him in Belgrade that afternoon. The Chamber so finds. A further significance, of course, is to provide yet further confirmation of the falsity of the evidence of Colonel Svičević, which the Chamber rejects elsewhere in this decision,<sup>512</sup> that the events at Dubrovnik that morning were not known by the Accused and the 2 OG Headquarters until mid-afternoon.

158. It is also the case that Admiral Jokić told Minister Rudolf that General Kadijević had ordered an investigation.<sup>513</sup> The Chamber did weigh, but rejected, whether this affords confirmation of a direct conversation between Admiral Jokić and General Kadijević. In particular neither the timing nor the subject (an investigation) fits readily with the evidence of Frigate-Captain Handžijev of the conversation he claimed to have overheard. Neither does Admiral Jokić suggest an investigation was intended in his 0700 hours conversation with the Accused. That being so, the mention of an investigation strengthens the possibility that this had been discussed by Admiral Jokić and the Accused after the Accused had spoken further to General Kadijević during the morning, following his initial conversation with Admiral Jokić. That remains, however, an issue that cannot be conclusively determined by the Chamber given the state of the evidence. Another clear possibility is that the suggestion of an investigation was an initiative of Admiral Jokić as a means of appeasing Minister Rudolf, although attributed to General Kadijević, an initiative which Admiral Jokić followed up that same afternoon when he made the same suggestion to General Kadijević in Belgrade. As will be seen, this suggestion was accepted that afternoon by General Kadijević.

159. As has been mentioned, the Chamber also attaches weight to the significant evidence of a meeting around midday on 6 December 1991 between the Accused and Colm Doyle at the Accused's headquarters at Trebinje. As recorded later, it is the Chamber's finding that at that meeting the Accused told Colm Doyle that he had responded to an attack on his troops in Bosnia and Herzegovina by firing on the city of Dubrovnik.<sup>514</sup> For reasons it explains later, the Chamber

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<sup>512</sup> See *infra*, para 163.

<sup>513</sup> Admiral Jokić, T 4088; Minister Rudolf, T 5612; Exhibit P61, tab 33.

<sup>514</sup> Colm Doyle, T 1716.

finds this to be an admission of the Accused that he ordered the attack on the Srđ feature at Dubrovnik.<sup>515</sup>

160. The total effect of the evidence about these issues leaves the Chamber persuaded that it should accept the evidence of Admiral Jokić that he and the Accused did speak by telephone about the shelling of Dubrovnik, and especially about the shelling of the Old Town, during the morning of 6 December 1991, and that they spoke more than once. Given evidence as to protests originating from Minister Rudolf and the ECMM monitors very early after shells commenced falling on the Old Town around or not long after 0600 hours,<sup>516</sup> the Chamber finds that an ECMM protest may well have reached General Kadijević in Belgrade before 0700 hours that morning from the ECMM representative staff in Belgrade.<sup>517</sup> The Chamber is persuaded, therefore, that despite its reservation about some aspects of the evidence of Admiral Jokić as to his actions that morning, it should accept the evidence of Admiral Jokić that the first conversation he had with the Accused was at around 0700 hours and was a conversation in which the Accused reported that a protest about the shelling of Dubrovnik had already reached General Kadijević. The Chamber has reservations about some of the other detail of that conversation, as recalled in the evidence of Admiral Jokić, which reservations were developed earlier in these reasons.<sup>518</sup>

161. The Chamber returns now to the very significant evidence of the meeting of the Accused with Colm Doyle on 6 December 1991. While the Defence initially challenged the evidence of this meeting and its date and place, in the course of the Defence case it called Colonel Svičević, who was then a senior staff officer of 2 OG, and who was actually present at the meeting on that day and had notes he had made during the meeting.<sup>519</sup> The Chamber has no difficulty finding that there was a meeting between the Accused and Colm Doyle on 6 December 1991. It occurred at the Accused's headquarters at the outskirts of Trebinje.<sup>520</sup> The Chamber accepts the evidence of Colm Doyle that the meeting took place between approximately 1200 and 1230 hours.<sup>521</sup> Colonel Svičević would put the meeting between 1100 and 1200 hours.<sup>522</sup> Nothing turns on the time difference.

162. It is the evidence of Colm Doyle that the Accused, whilst courteous, appeared preoccupied during the meeting.<sup>523</sup> It was said that much was happening that day.<sup>524</sup> It is the witness's evidence

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<sup>515</sup> See *infra*, paras 166-167.

<sup>516</sup> See *supra*, paras 101-102.

<sup>517</sup> Admiral Jokić, T 4050. See also Milovan Zorc, T 6639-6640.

<sup>518</sup> See *supra*, para 152.

<sup>519</sup> Colonel Svičević, T 7089.

<sup>520</sup> Colm Doyle, T 1713-1714. See also, Exhibit P46 which is the personal diary of the witness in which the meeting with the Accused is recorded, and Exhibit P47 which is a photograph taken at the end of the meeting.

<sup>521</sup> Colm Doyle, T 1712; 1718.

<sup>522</sup> Colonel Svičević, T 7098.

<sup>523</sup> Colm Doyle, T 1715-1716.

that after he and the Accused introduced each other and their missions, through a JNA interpreter, the Accused told him that he was angry because paramilitaries on the territory of Bosnia and Herzegovina had attacked his troops, which he could not tolerate, and that he had responded by firing on the city of Dubrovnik.<sup>525</sup> The witness testified that these were the words of the Accused as conveyed to him by an official JNA interpreter,<sup>526</sup> and that he was taken by surprise at what he saw as an admission by a senior military officer of an action taken against a city.<sup>527</sup> As has already been noted, Colm Doyle had no knowledge of the attack on Dubrovnik before he met the Accused that day.<sup>528</sup>

163. This evidence is contradicted by Colonel Svičević who testified that he was present at the meeting in the presence of the Accused, Colm Doyle, another ECMM representative and a liaison officer from the command of the JNA Sarajevo district who was interpreting what was being said.<sup>529</sup> On the basis of the notes he took of the meeting,<sup>530</sup> the witness testified that the discussion related to the preservation of peace in Bosnia and Herzegovina, and more particularly to previous incidents in Neum, as Colm Doyle was a newly appointed ECMM team leader for Bosnia and Herzegovina and the 2 OG had troops there.<sup>531</sup> Colonel Svičević testified that he was present throughout the meeting and that he had no recollection of any reference to artillery fire being opened on Dubrovnik,<sup>532</sup> although it was apparent from his evidence that his actual “recollection” was based on the notes. No such reference is recorded in his notebook,<sup>533</sup> although he accepted that some unofficial conversation between Colm Doyle and the Accused was not recorded in the notebook.<sup>534</sup> The Chamber is unable to accept the evidence of Colonel Svičević. He purported to depend on the notes he made in his notebook. Yet, on their face, they do not support the interpretation he placed on them. His efforts to reinterpret his notes by distorting their order appeared to the Chamber to be patently false. Both logic and his demeanour provided confirmation of this. Further, in the Chamber’s finding, the effect of his evidence is that his notes were not exhaustive<sup>535</sup> and were made to help him with his own essentially public relations duties.<sup>536</sup> That being so, he would hardly note such an admission by his General.

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<sup>524</sup> Colm Doyle, T 1714.

<sup>525</sup> Colm Doyle, T 1716.

<sup>526</sup> Colm Doyle, T 1759-1761.

<sup>527</sup> Colm Doyle, T 1716-1717.

<sup>528</sup> Colm Doyle, T 1708-1709; 1716-1717.

<sup>529</sup> Colonel Svičević, T 7089; 7166-7167.

<sup>530</sup> Exhibits D92, D93 and D94.

<sup>531</sup> Colonel Svičević, T 7098.

<sup>532</sup> Colonel Svičević, T 7100-7101.

<sup>533</sup> Exhibit D94, pp 129-137.

<sup>534</sup> Colonel Svičević, T 7236-7237; 7240.

<sup>535</sup> Colonel Svičević, T 7236-7237; 7239-7240.

<sup>536</sup> Colonel Svičević, T 7059.

164. Notwithstanding the fact that the conversation between Colm Doyle and the Accused was conducted through an interpreter, the Chamber notes that Colm Doyle also had a competent interpreter present<sup>537</sup> who had no occasion to intervene at any stage to correct or query any aspect of the interpretation by the JNA interpreter. The Chamber was impressed with the candour and care of Colm Doyle about his evidence. It is conscious that his evidence is based essentially on his recollection which was first recorded some four years after the conversation<sup>538</sup> so that the possibility of faulty recollection at the time must be weighed. To the contrary, however, is the brief but very compelling note made by Colm Doyle in his diary probably later on 6 December<sup>539</sup> which was “12.00 met with Gen Strugar (three star) bad in Dubrovnik.”<sup>540</sup> A note which confirms that Dubrovnik was, to Colm Doyle, the compelling point of the conversation with the Accused, rather than a location in Bosnia and Herzegovina as suggested by Colonel Svičević. There was later conversation, however, about events in Bosnia and Herzegovina and the Accused had mentioned events in Bosnia and Herzegovina as the reason for his ordering fire on Dubrovnik. The Chamber finds Colm Doyle’s evidence to be very reliable and understands it as an unequivocal admission by the Accused that there had been firing that day on Dubrovnik by troops under his command, which firing occurred on the Accused’s deliberate order, his offered explanation being the conduct of opposing forces in Bosnia and Herzegovina.

165. There is of course room for speculation as to why the Accused would make such a statement or as to why events in Bosnia and Herzegovina would have led him to respond in Dubrovnik; of course that may have been truly the position or merely an excuse. One obvious reason for the issue being raised was for the Accused to try and offer some justification for his conduct. The Chamber cannot resolve such issues. This event does provide, however, a telling insight into what was in the forefront of the Accused’s thoughts, at that stage on 6 December 1991. These matters do not change the fact that the Accused very clearly indicated on 6 December 1991 that he had his troops fire on Dubrovnik. The issue is then what the Accused meant by his reference to the city of Dubrovnik.

166. In the context of the present Indictment there is a tendency to jump to the view that this is an admission that the Accused ordered his troops to fire on the Old Town. The Chamber, however, must be more circumspect about the meaning of these words. The reference was to the city of Dubrovnik, not to the Old Town.<sup>541</sup> Dubrovnik is a much more extensive locality than the Old

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<sup>537</sup> Colm Doyle, T 1760-1761.

<sup>538</sup> Colm Doyle, T 1788.

<sup>539</sup> Colm Doyle did not remember when exactly he made this entry to his diary but it was his practice to fill in the diary the evening or the following day, T 1712-1713.

<sup>540</sup> Exhibit P46; Colm Doyle, T 1712-1713.

<sup>541</sup> Colm Doyle, T 1716.

Town. Indeed as a region, as noted at the outset of this decision, it is quite extensive. On 6 December 1991, however, the only part remaining in the occupation of Croatian forces was the greater city of Dubrovnik which included the Old Town and also, both geographically and as a matter of ordinary language, Srd as the dominant topographical feature of the city of Dubrovnik. The Chamber understands from the evidence of Colm Doyle that the Accused's given explanation for the firing on Dubrovnik was founded on attacks on his troops by paramilitaries. As the JNA did not then accept that Croatia had lawfully left the SFRY, all Croatian forces were regarded by the JNA as paramilitaries as they were not lawfully constituted as a military force.<sup>542</sup> To the JNA forces, all of whom in the region were under the Accused's command, Srd was an ongoing sign of the failure of the JNA in November to sweep the Croatian forces from the heights around Dubrovnik. Srd was therefore the position in Dubrovnik which could most effectively strike a decisive blow to Croatian forces. Its capture would deny them the one position which offered them a clear defensive advantage, while significantly enhancing the effectiveness of the JNA's grip on Dubrovnik. The taking of Srd might well also have been anticipated to be a significant psychological blow to the people of Dubrovnik such that it could well encourage a more ready acceptance of JNA proposals to resolve the situation Dubrovnik faced.

167. While the words of the Accused to Colm Doyle can be interpreted as indicating that he ordered his troops to fire on the greater city of Dubrovnik, in the Chamber's view his words are very well capable of being understood as an admission that the attack being made that day by the JNA was on his order. This was, as the Chamber has found, an attack directed at Srd, but as will be discussed, the order to attack Srd also contemplated some shelling of the city. This evidence leads the Chamber to conclude that what the Accused was in fact saying to Colm Doyle was that he responded to attacks on his troops in Bosnia and Herzegovina by having his troops attack the obviously advantageous and strategic Croatian "paramilitary" position in Dubrovnik which jeopardised JNA troops in the area, namely Srd. His reference to the city is also consistent with an awareness that the city was indeed being shelled by his forces during the attack. The Chamber is conscious that this finding as to the meaning of his words is more favourable to the Accused than a more literal understanding. This admission by the Accused of his direct responsibility for the attack that day is also strongly consistent, in the Chamber's view, with the military realities of the JNA, pursuant to which it is difficult indeed to conceive that the attack would have been launched at the level of the 9 VPS, without the concurrence of the 2 OG, especially at such a critical point of time because of the negotiations and the wider political activity we have mentioned.<sup>543</sup>

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<sup>542</sup> Admiral Jokić, T 4368.

<sup>543</sup> See *supra*, paras 79-81.

168. There remains the issue when the Accused gave the order for his troops to attack Srd. On one view the preoccupation of the Accused, which was noticed by Colm Doyle,<sup>544</sup> and the Accused's indication that he gave the order because of his anger,<sup>545</sup> could suggest that he had acted in anger that morning. The preoccupation of the Accused and any indication of actual anger during the meeting is also consistent, however, with the Accused's concern that the attack on Srd had not gone as anticipated. Instead of Srd being captured quickly and well before 1200 hours, it was by then after 1200 hours and the attack was showing little sign of succeeding.<sup>546</sup> Further, the course of the morning had led to extensive JNA shelling of Dubrovnik including, in the finding of the Chamber, shelling of the Old Town,<sup>547</sup> such that the Federal Secretary General Kadijević had expressed his anger to the Accused at the course of events and the Accused had been ordered to Belgrade that afternoon to discuss the situation even while the attack was still continuing and his troops continued to be in some jeopardy.

169. If the Accused's explanation to Colm Doyle for his order did represent the truth, and was not merely an attempt to provide an excuse, the anger of which he spoke was anger at the conduct of paramilitaries in Bosnia and Herzegovina. He did not say that this conduct had occurred that morning. The evidence does not identify what that conduct may have been. Other evidence discloses, however, as found by the Chamber elsewhere in this decision, that the detailed planning of the attack and preparations for its implementation were made the day before.<sup>548</sup> This indicates the order was given on 5 December for an attack on the 6 December. The Chamber further notes that an order for such an attack given on 5 December would be given by the Accused in the knowledge of whatever instructions were given to him during the meeting at the General Staff on 3 December 1991, when the Accused was directed to undertake the negotiations with Minister Rudolf concerning Dubrovnik, the conduct of which negotiations he in turn delegated to Admiral Jokić.<sup>549</sup> Whether it was the decision to take Srd, or the manner of its execution on 6 December, which angered General Kadijević remains an open question.

170. The Accused and Admiral Jokić flew together from Podgorica to Belgrade on the afternoon of 6 December 1991 as ordered by General Kadijević.<sup>550</sup> There is some difference in the evidence as to the time of their departure. Admiral Jokić thought that he left at around 1300 hours, although there is a note in the 9 VPS war diary that Admiral Jokić "shall be at Čilipi at 1400 hours."<sup>551</sup> The

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<sup>544</sup> Colm Doyle, T 1715.

<sup>545</sup> Colm Doyle, T 1716-1717.

<sup>546</sup> See *supra*, paras 139-140.

<sup>547</sup> See *supra*, paras 104-110.

<sup>548</sup> See *supra*, paras 96; 98.

<sup>549</sup> See *supra*, paras 79-80.

<sup>550</sup> Admiral Jokić, T 4074; Exhibit D96.

<sup>551</sup> Exhibit D96.

Admiral did fly from Čilipi by helicopter to Podgorica to meet the Accused for the flight to Belgrade. The time is not critical. The evidence indicates they had returned together by about 1730 hours.<sup>552</sup>

171. In Belgrade the meeting with the Federal Secretary of Defence General Kadijević took place at the headquarters of the General Staff of the JNA. General Simonović and the Chief of Staff General Adžić were also present.<sup>553</sup> The only evidence as to what occurred at that meeting is from Admiral Jokić. It was his evidence that General Kadijević asked the Accused and Admiral Jokić together about the events that morning at Dubrovnik and accused both of them of not having acted wisely.<sup>554</sup> It was Admiral Jokić's evidence that the Accused essentially left it to Admiral Jokić to explain what had occurred, so that the Admiral felt somewhat abandoned by the Accused who did not explain more extensively what had happened.<sup>555</sup> Hence, it was the Admiral's evidence that he felt that he was being portrayed as the main perpetrator. This did not coincide with his own view of the events.

172. It is the evidence of Admiral Jokić that during the meeting he proposed that he should carry out an investigation.<sup>556</sup> Following this, still in the presence of the Accused, General Kadijević in essence told Admiral Jokić to go to the Old Town and try to repair the damage and sort things out.<sup>557</sup> It is not the evidence that at this meeting there was an explicit order from General Kadijević to Admiral Jokić to conduct an investigation into the shelling of the Old Town, although an acceptance that he should do so was implicit.

173. Given the evidence as to this meeting and the events involving General Kadijević earlier that day concerning this matter, it is apparent, in the finding of the Chamber, that the JNA was in what is colloquially described as "damage control mode" at that stage in respect of the attack Dubrovnik, especially the Old Town. The attack had provoked virtually immediate and strong adverse international reaction with General Kadijević himself being directly contacted by the European Community representative in the very early stages of the attack.<sup>558</sup> An investigation of some type was an obvious step in deflecting adverse international opinion. All forces involved in the attack were under the immediate command of Admiral Jokić. He therefore had investigative and disciplinary powers. He had represented the JNA, as the Accused's deputy, in the Dubrovnik

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<sup>552</sup> Admiral Jokić, T 4071.

<sup>553</sup> Admiral Jokić, T 4079.

<sup>554</sup> Admiral Jokić, T 4079.

<sup>555</sup> Admiral Jokić, T 4081.

<sup>556</sup> Admiral Jokić, T 4112.

<sup>557</sup> Admiral Jokić, T 4112.

<sup>558</sup> Ambassador Fietelaars, T 4192-4193.

negotiations held the previous day.<sup>559</sup> He had been in touch with the Croatian leaders in Dubrovnik and the EC representatives that morning. He proposed to General Kadijević that he should undertake an enquiry. He was thereby an obvious person, if not the obvious person, to investigate and prepare a report, and to do so consistently with his assigned task of trying “to repair the damage and sort things out.”

174. What followed, in the finding of the Chamber, evidences the tenor and the effect of the understanding or instructions Admiral Jokić took from the Belgrade meeting. His immediate actions were to give unqualified assurances, citing the authority of General Kadijević, of a thorough investigation and action to deal with the perpetrators, to Minister Rudolf,<sup>560</sup> the Dubrovnik Crisis Committee and the ECMM.<sup>561</sup> He called for reports from a few of his senior staff,<sup>562</sup> reports which were not conveyed to anyone else. He dispatched officers to “improve” the morale of the units involved in the attack who by the end of the day considered they had suffered defeat, and also to seek to determine from these units what had occurred.<sup>563</sup> Their reports, if any, were not conveyed to anyone else. He removed one acting battalion commander from his post, Lieutenant-Colonel Jovanović of the 3/5 mtbr,<sup>564</sup> but returned him immediately to his normal duties without any adverse disciplinary or other action. He then reported to the Federal Secretariat briefly on these matters, and generally on the action of 6 December 1991, in a way which was quite out of keeping with the facts as revealed by the evidence in this case, so as to put the conduct of the JNA forces in a more favourable light. His report included an assurance that “final and all encompassing” measures would follow.<sup>565</sup> There never were any. The next day, a “Commission” of three 9 VPS officers visited the Old Town to report on the damage.<sup>566</sup> Admiral Jokić endorsed their report, which sought to minimise the nature and extent of the damage and deflect responsibility for its cause from the JNA, when even a cursory viewing of the accompanying film would have disclosed its inadequacy.<sup>567</sup> He took no other disciplinary or administrative action to better determine the truth of what occurred or to deal with those responsible. A glaring indication of the sham which, in the finding of the Chamber, this investigation and these measures were, is provided by the fact that

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<sup>559</sup> See *supra*, paras 80-81.

<sup>560</sup> Minister Rudolf, T 5568-5572; 5612, Exhibit P61, tab 33.

<sup>561</sup> Per Hvalkof, T 2204, Exhibit P61, tab 35.

<sup>562</sup> Admiral Jokić, T 4094-4095.

<sup>563</sup> Admiral Jokić, T 4095. Captain Nešić testified that on 7 December 1991 officers from the command of the 9 VPS visited the soldiers of the 3/472 mtbr and spoke to them, T 8187; see also Exhibit D112. Lieutenant Lemal also testified that on 6 December officers of the 9 VPS visited his unit to discuss what had happened during that day and the morale of the troops, T 7421.

<sup>564</sup> Lieutenant-Colonel Jovanović, T 8094; Exhibit D65; Admiral Jokić, T 8553.

<sup>565</sup> Exhibit D65.

<sup>566</sup> Admiral Jokić, T 4109; Exhibit P61, tab 39. Lars Brolund testified that on 8 December he assisted JNA officers and photographers in their inspection of the town, T 885. Lieutenant-Colonel Đurasić testified that three officers in civilians clothes with a video camera passed by his command post at Mokošica on their way to Dubrovnik to film the damage and on their way back, T 7011-7012.

the 120 mm mortar battery of the 3/5 mtbr was not within range of the Old Town.<sup>568</sup> They were the only artillery weapons under the command of Lieutenant-Colonel Jovanović, who was the ONLY officer who was removed by Admiral Jokić from his command. This was a temporary command, which Lieutenant-Colonel Jovanović held for only one day.<sup>569</sup> This battery could not have caused damage to the Old Town on 6 December 1991. Admiral Jokić took no disciplinary action against anyone else. The evidence discloses no action by the Accused to investigate or discipline anyone in respect of the shelling of the Old Town or the events of 6 December 1991. In short no one has been disciplined or suffered adverse action for the shelling of the Old Town, on 6 December 1991. In fact, some 8 days after 6 December 1991 Captain Kovačević, who commanded the attack, was promoted.<sup>570</sup>

175. The only explanation offered by Admiral Jokić is that he could not find any evidence to justify action. Even were it to be accepted that he knew nothing of the Accused's order to attack and capture Srđ, the coordinated nature of the attack, the involvement of units other than 3/472 mtbr, especially the howitzer battery at Čilipi which Admiral Jokić repeatedly prevented firing on 6 December 1991, and of his Chief of Staff Warship-Captain Zec and other 9 VPS staff officers on 5 and 6 December, provided glaring evidence that the attack was not the conduct of Captain Kovačević acting alone and on the spur of the moment on the morning of 6 December 1991, without authority and contrary to orders. That continued to be the explanation offered by the JNA and for which the Accused apologised in a note to Minister Rudolf.<sup>571</sup> It was the explanation for which at least some JNA records had been manipulated falsely to provide some apparent foundation or confirmation, as the Chamber has already found. The explanation of Admiral Jokić for the absence of disciplinary action by him is not persuasive. The Accused's position is considered specifically later in this decision.

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<sup>567</sup> Exhibit P145; Admiral Jokić, T 4337-4338.

<sup>568</sup> Admiral Jokić, T 4022-4023.

<sup>569</sup> See *infra*, para 387.

<sup>570</sup> Exhibit P133.

<sup>571</sup> Minister Rudolf, T 5612-5613.

## **F. How did the Old Town come to be shelled?**

176. The evidence reviewed to this point shows that on 6 December 1991 the Old Town of Dubrovnik was heavily shelled over some ten and a half hours. As is detailed later in this decision, there was extensive damage to property, even though the Old Town was a World Heritage protected site. There was also injury to, and death of, civilians from the shelling.<sup>572</sup> It should be clearly recorded that at the time of the shelling the Old Town was occupied by a civilian population. The Old Town was their place of living and working. Because of the blockade that had been enforced by the JNA the population of Dubrovnik, including the Old Town, had been without normal running water and electricity supplies for some weeks and essential products to sustain the population, such as food and medical supplies, were in extremely short supply.<sup>573</sup>

### **1. Extent of damage**

177. In the course of the Defence case the view was pursued, by submission and in evidence, that in truth there had been little or no damage to the Old Town.<sup>574</sup> Indeed, the report of the “Commission” of JNA officers who visited the Old Town on 8 December 1991 to assess the allegations of damage tended strongly to advance this appreciation of the position.<sup>575</sup> The evidence shows that this Commission failed to inspect areas of the Old Town so that some damage was not considered at all.<sup>576</sup> Further, the report submitted by the Commission failed to represent the true position as it has been established by the evidence before the Chamber.<sup>577</sup> A short film made by the Commission and which accompanied their report demonstrates how misleading were the views of the Commission in the report.<sup>578</sup> Another film, made by the Croatian interests and which recorded the inspection by the Commission, demonstrates this even more effectively.<sup>579</sup>

178. In the Chamber’s finding the report was not a genuine attempt to record the true state of the damage which existed in the Old Town from the attack on 6 December 1991. There had been extensive cleaning-up operations by the people of Dubrovnik on the evening of 6 December and on 7 and 8 December 1991.<sup>580</sup> Even allowing for this, the damage which the report purported to identify, and the observations as to the cause of some of that damage, as viewed by the Commission, represent a serious understatement of the true state of affairs and of the extent of the

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<sup>572</sup> See *infra* paras 250; 259; 270; 276 and 330.

<sup>573</sup> Adrien Stringer, T 310; Paul Davies, T 571; Slavko Grubišić, T 1028; Đelo Jusić, T 3060.

<sup>574</sup> Defence Final Brief, paras 510-521.

<sup>575</sup> Admiral Jokić, T 4109-4111.

<sup>576</sup> Exhibit P61, tab 39; Slobodan Vuković, T 5990-5993; 5827.

<sup>577</sup> See *supra*, para 174.

<sup>578</sup> Exhibit P145.

<sup>579</sup> Exhibit P78.

<sup>580</sup> Nikola Jović, T 2964-2965; Witness A, T 3635-3636; Slobodan Vuković, T 5914.

actual damage from the shelling on 6 December 1991 and its seriousness. In the Chamber's finding the report represents an attempt to minimise the damage caused on 6 December 1991 and, in some respects, to misrepresent the causes of that damage.

179. Notwithstanding the report of the JNA Commission, the evidence before the Chamber establishes that there was widespread and substantial, *i.e* large scale, damage to the Old Town from shelling on 6 December 1991. Later in these reasons, the Chamber records its findings as to the nature and extent of the damage, which it finds to be proved, to those buildings and structures in the Old Town which were specifically particularised in the Indictment.<sup>581</sup> While that damage in itself constituted, in the Chamber's view, wide-spread destruction, it is not the case that the Chamber finds that the damage inflicted on 6 December 1991 was confined to those particular findings. The Chamber is satisfied on the evidence that there was other damage and that all told the damage extended over a substantial part of the Old Town. The specific findings in this decision are merely in respect of those buildings and structures, particularised in the Indictment, in respect of which the Chamber is able to make specific findings that damage caused on 6 December 1991 has been established to those particular buildings, despite the evidential difficulties of identification of particular buildings. It is only this particularised and proved damage, of course, which will be taken into account for the purposes of determining guilt or innocence.

## 2. Was damage deliberately inflicted by Croatian forces or interests?

180. One position for which the Defence contended is that any damage, alternatively some of the damage, to the Old Town was in fact deliberately inflicted by the Croatian defending forces or other Croatian interests.<sup>582</sup> It was suggested that this was done to create a false picture of damage by the JNA to the Old Town. In particular, it was advanced that damage was deliberately inflicted by Croatian interests to buildings in the Old Town which were owned or occupied by Serbian interests.<sup>583</sup> Further motives for this might include anger or revenge.

181. For reasons set out in our consideration of the issue of damage the Chamber finds that these submissions are also without factual foundation. In particular, as regards the proposition that buildings with shops "owned by" or "connected to" people from Serbia and Montenegro were totally destroyed,<sup>584</sup> the Chamber observes that the evidence on which the Defence bases its submission is that in one of those shops Belgrade ready-made clothes were sold and two of the

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<sup>581</sup> See *infra* para 326.

<sup>582</sup> Defence Final Brief, para 518; see also, Exhibit P23.

<sup>583</sup> Defence Final Brief, para 518.

<sup>584</sup> Defence Final Brief, para 518.

others were called “Titex” and “Kluz”.<sup>585</sup> The conclusion as to the alleged connection between “Titex” and Titograd (Podgorica), as well as the name “Kluz” and a Belgrade manufacturer, were drawn by the Defence counsel with no support in the evidence.<sup>586</sup> Only one of those shops was explicitly identified by witness Đelo Jusić as belonging to a Serbian.<sup>587</sup> Further, the evidence of Zineta Oresta, on which the Defence also relies in this connection, is that the warehouse of a shop located on the ground floor of the building where she lived was called “Obuća Beograd”.<sup>588</sup> There is no evidence, however, that the shop was owned by a Serbian. The Defence proposition thus appears to be without evidentiary foundation. It also overlooks the fact that other occupancies of the buildings had no connection with Serbian or Montenegrin interests.<sup>589</sup> On the contrary, as detailed in this decision, there is a clear and strong body of evidence, indeed an overwhelming body, that the damage inflicted in and to the Old Town of Dubrovnik on 6 December 1991 was caused by the JNA shelling.<sup>590</sup> The Chamber so finds.

### 3. Did JNA forces fire only at Croatian military positions?

182. Yet a further Defence submission, and one which is somewhat inconsistent with the submissions that have just been considered, is that any damage to the Old Town on 6 December 1991 was a regrettable but unavoidable consequence of artillery fire of the JNA targeted at Croatian military positions in and in the immediate vicinity of the Old Town. The Defence submits that the attack on the Old Town by the JNA was merely in response to Croatian fire from its positions.<sup>591</sup> There is evidence on which the Defence relies in support of this proposition. There is also evidence to the contrary. The Chamber will examine this contradictory evidence.

183. By way of general observation, to which the Chamber attaches significant weight, the Chamber notes that by 6 December 1991 there were quite compelling circumstances against the proposition that the Croatian defenders had defensive military positions in the Old Town. To do so was a clear violation of the World Heritage protected status of the Old Town. The Chamber accepts there was a prevailing concern by the citizens of the Old Town not to violate the military free status of the Old Town.<sup>592</sup> That is the view of the Chamber, notwithstanding suggestions in the evidence

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<sup>585</sup> Đelo Jusić, T 3277-3280; Exhibit P78.

<sup>586</sup> Đelo Jusić, T 3277-3280.

<sup>587</sup> Đelo Jusić, T 3096.

<sup>588</sup> Zineta Oresta, T 3454.

<sup>589</sup> Đelo Jusić, T 3280.

<sup>590</sup> See *supra*, paras 100; 103 and 139.

<sup>591</sup> Defence Final Brief, paras 374 and 608.

<sup>592</sup> Captain Negodić, T 5240; 5242; The evidence shows that the Old Town was generally free from military positions (Nikola Jović, T 2966; Lucijana Peko, T 1877; 1955-1960; Captain Negodić, T 5240-5242; Đelo Jusić, T 3124-3125; Zineta Oresta T 3494; Mato Valjalo T 2012). The local authorities imposed a ban on armed persons to enter the Old Town and special checks were carried out at the town gates in order to enforce the ban (Nikola Jović, T 2988-2989; Captain Negodić, T 5240-5241; Ivo Vlašića T 3424-3425). However, a small number of soldiers

that at times in earlier stages of the conflict there were violations of this by Croatian defending forces.<sup>593</sup> Whether or not that was so, in particular by early December 1991, independent ECMM military monitors had again established themselves at Dubrovnik and were specifically concerned *inter alia* to look out for violations of ceasefire agreements.<sup>594</sup> United Nations Agency officials had also arrived, including the witness Colin Kaiser who was actually staying in the Old Town on 5 and 6 December, for whom the protection, and military free status, of the Old Town were matters of direct responsibility.<sup>595</sup> The events over the preceding weeks had also attracted reporters and cameramen of the world media to Dubrovnik and the Old Town.<sup>596</sup>

184. The presence of these various independent observers, who were alert to observe activities in the Old Town especially any military operations, highlights the improbability that the Croatian defenders would establish or utilise defensive positions in the Old Town, or fire artillery or other weapons from the Old Town, and that any such activity could go undetected. No one of the witnesses from these independent interests who gave evidence observed any defensive positions, any military activity, or any artillery or other firing from the Old Town on 5 or 6 December 1991.<sup>597</sup>

185. There was however Defence evidence to the contrary. A staff officer of 9 VPS, Captain Drljan, was at Žarkovica for about an hour, perhaps between 0800 and 0900 hours, on 6 December 1991.<sup>598</sup> He claimed to have observed a mortar in the middle of the Stradun. According to the witness, the mortar was carried into the Stradun and a shell was fired from it in the direction of Srd.<sup>599</sup> The whole process was said to be carried out within one minute.<sup>600</sup> The same defence witness also spoke of what he inferred was a Croatian mortar firing from behind the Orlando column outside the St Blaise church at the southern end of the Stradun. The witness said that at 0830 hours he saw there flares of light, which, in his view, were a result of shell firing.<sup>601</sup> In respect of this evidence the Chamber observes that it has a body of evidence, which it accepts, that a mortar needs to be mounted on a surface which will absorb the shock of the firing. There is real danger to those firing if firing is attempted on a hard surface such as the smooth stone of the

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could occasionally be seen in the streets of the Old Town, sometimes with rifles or pistols (Đorđe Ciganović, T 2902; Nikola Jović, T 2985-2986; Colin Kaiser, T 2466; Mato Valjalo, T 2011; Lieutenant-Colonel Stojanović, T 7816-7820; Captain Negodić, T 5240). The Trial Chamber disregards the evidence of Ivo Grbić to the effect that no uniformed persons were present in the Old Town, considering that it is in contradiction with the majority of the evidence on the issue and the witness was by no means in a position to assess the situation in all the places within the town walls, T 1415-1418. A similar testimony given by Slobodan Vuković is likewise to be approached with caution, as that witness was not present in the Old Town on that day, until late evening, T 6144-6145; T 5825-5826.

<sup>593</sup> Admiral Jokić, T 4970-4972.

<sup>594</sup> Per Hvalkof, T 2237-2238.

<sup>595</sup> Colin Kaiser, T 2379-2380; 2471-2480.

<sup>596</sup> Paul Davies, T 568-569.

<sup>597</sup> Lars Brolund, T 874; Per Hvalkof, T 2218-2219.

<sup>598</sup> Captain Drljan, T 7703.

<sup>599</sup> Captain Drljan, T 7704-7705; 7711; 7735-7736.

<sup>600</sup> Captain Drljan, T 7735-7736.

Stradun. If firing is to be attempted, special surface preparation, such as a bed of sandbags or a rubber pad, is necessary to absorb the shock.<sup>602</sup> Captain Drljan gave no evidence of observing any such surface preparation and the time he suggested for the firing effectively precludes this. As regards the Orlando column, the Chamber notes that the witness did not purport to see a weapon, only flashes.<sup>603</sup> The column itself is not visible at all from Žarkovica because it is right behind tall buildings.<sup>604</sup> The witness inferred that a weapon was firing, he says, on the basis of observing flashes. His evidence as to the time indicates that daylight conditions prevailed. There is evidence that is hardly possible to see such flashes in daylight.<sup>605</sup> As the witness could neither see the mortar, nor even the Orlando column, the purported identification of firing flashes is extremely unpersuasive. While the general atmospheric visibility is said to have been quite good that day,<sup>606</sup> the video and other evidence reveals there was already smoke and haze over the Old Town by 0830 hours from the effects of over two hours of shelling.<sup>607</sup> That adversely affected visibility of the Old Town. The witness' evidence also fails to deal satisfactorily with the issue how he could distinguish, especially in those visibility conditions and at that distance, between the flash of a weapon firing and the flash of an incoming mortar shell exploding. JNA shells were exploding in the Old Town by that time.

186. It will be recalled that earlier in this decision the Chamber had reasons for regarding as unsatisfactory this witness' description of his conduct at Žarkovica.<sup>608</sup> It was his evidence that he had been sent there by Warship-Captain Zec to convey an order from Admiral Jokić to Captain Kovačević not to fire on the Old Town. It is his evidence that, having conveyed that order, he then saw it breached, but he took no action at the time, nor did he report the breach, even though he was a staff officer of 9 VPS.<sup>609</sup> The Chamber also notes that it is not the evidence of Captain Drljan that he reported these supposed sightings to Captain Kovačević or anyone else at Žarkovica that morning. He did say that on his return to the 9 VPS command post he reported to Captain Kozarić and assumed the latter recorded his report in the war logbook.<sup>610</sup> No such record has been identified.

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<sup>601</sup> Captain Drljan, T 7711; 7749-7752.

<sup>602</sup> See *infra*, para 190; Captain Drljan, T 7736-7739.

<sup>603</sup> Captain Drljan, T 7711.

<sup>604</sup> Exhibit C1/2, "View of the Old Town from Žarkovica" and "View of 3 arches at Gradska Kavana from Žarkovica"—the Bell Tower is visible and only the top floor of the building located on the other side of the Luža Square, where the Orlando Column stands. See Annex III.E.

<sup>605</sup> Captain Drljan, T 7752-7754.

<sup>606</sup> Captain Drljan, T 7703-7704.

<sup>607</sup> Exhibit P66 at 31:18-31:30; Exhibit P78 at 11:57, 13:24.

<sup>608</sup> See *supra*, para 136.

<sup>609</sup> Captain Drljan, T 7728-7729.

<sup>610</sup> Captain Drljan, T 7740-7744.

187. Captain Pepić testified that in the morning of 6 December 1991 he observed something that in his opinion was the firing of a mortar from a side street off the Stradun to the left.<sup>611</sup> He said he saw a flash spreading from the street level, where in his view the mortar was positioned, to the top of the building.<sup>612</sup> The witness did not see the object that caused that flash. As just discussed in respect of the evidence of Captain Drljan, incoming mortar shells were exploding in the Old Town at that time<sup>613</sup> and the conditions were difficult for visibility of the Old Town that morning, especially from that distance. This is not persuasive evidence of the firing of a mortar near the Stradun, even if it is accepted that Captain Pepić saw a flash or flashes. Captain Pepić further testified that at 0800 hours on 6 December 1991 he saw with his naked eye a mortar and an anti-aircraft weapon at the entrance to the Old Town from the sea. He said he did not see them fire, but heard from colleagues that fire had been opened from the latter weapon.<sup>614</sup> According to the witness, the mortar was first at the gate of the city walls and then was brought to the pier at which boats were tied. His testimony was that the anti-aircraft gun was on the tower of St. Luka, which is to the right from that gate,<sup>615</sup> when viewed from Žarkovica. In the witness's view, that gun was positioned to fire "at Bosanka or rather at Srd".<sup>616</sup> The Chamber observes that Captain Pepić did not suggest that he saw firing by those weapons. There is an immediate and obvious difficulty in accepting that weapons of that nature could be identified with the naked eye at that distance as Captain Pepić was at Žarkovica, which is in the order of 2,300 metres from that entrance to the Old Town.<sup>617</sup> There is the added difficulty that visibility was less than clear of that location by 0800 hours on 6 December 1991 because of the explosions and fires, as the evidence before us demonstrates. Apart from general considerations, some of which have just been mentioned and others will be noted shortly, the Chamber notes the evidence of Captain Negodić, who was a senior officer in the organisation of the Croatian defence that day, especially the artillery defence,<sup>618</sup> the effect of which was to deny the presence of any such weapons in those locations. As discussed elsewhere in this decision, Captain Negodić was, in the Chamber's assessment, an honest witness with a generally reliable recollection. Captain Negodić specifically denied the presence of any heavy weapon on the city walls,<sup>619</sup> or of a 52mm single-barrel gun on the tower of St. Luka and an anti-aircraft machine-gun active in the old port area.<sup>620</sup> The Chamber observes that both positions

<sup>611</sup> Captain Pepić, T 7494; 7549-7552.

<sup>612</sup> Captain Pepić, T 7549-7552.

<sup>613</sup> Captain Pepić, T 7558-7560.

<sup>614</sup> Captain Pepić, T 7493-7494; 7496; 7527-7530.

<sup>615</sup> Captain Pepić, T 7520-7521. The witness referred to the tower to the right from the entrance. The only tower corresponding to this description, on the map tendered into evidence under number P13, is the tower of St Luka.

<sup>616</sup> Captain Pepić, T 7520-7521.

<sup>617</sup> Exhibit C1/1, p 4.

<sup>618</sup> Captain Negodić, T 5149.

<sup>619</sup> Captain Negodić, T 5245.

<sup>620</sup> Captain Negodić, T 5366-5367. The witness referred in fact to the "fish shop". The fish shop (*Ribarnica*) is, as explained by Captain Nešić, "at the entrance to the Old Town from the side of the port", T 8171.

identified in Captain Pepić's evidence are entirely exposed with no protection from an attack, and are therefore unlikely locations for such weapons in the circumstances. The evidence as to the size and design of such an anti-aircraft gun indicates the difficulty of manoeuvring such a weapon onto the top of the St Luka tower, except by dismantling it and manually transporting the components, which is a lengthy process. The surface of the pier is hard stone and unsuitable for mortar firing except with special surface preparation.<sup>621</sup> The position of the ECMM monitors offered a clear view of these positions, yet the presence or firing of either of these weapons was not noted.

188. Captain Nešić, who on 6 December 1991 saw the Old Town of Dubrovnik and the surrounding parts of the town from his observation post on the top of Žarkovica, stated that around noon an anti-aircraft gun located in the area of the tower of St. Luka<sup>622</sup> opened fire in the direction of his unit.<sup>623</sup> The gun, according to the witness, was located in the middle window (there are three) on the tower of the fort in the old port<sup>624</sup> and one could fire from that position only at him or at the sea.<sup>625</sup> The evidence identified the St. Luka tower. Captain Nešić further testified that in the morning he saw an 82-millimetre mortar firing at Srd from the most southern tower of the walls of the Old Town.<sup>626</sup> The Chamber observes that on 6 December 1991 both Captain Pepić and Captain Nešić were next to each other on Žarkovica.<sup>627</sup> Despite this, neither purports to have seen what the other saw. It is hardly conceivable that from the same point they noticed completely different military positions, none of which corresponds with any of those spotted by the other. This is most striking in the case of the tower of St. Luka. Captain Pepić talked about an anti-aircraft gun allegedly located on the top of that tower and targeting Srd. The anti-aircraft gun referred to by Captain Nešić was located inside the tower, down near the sea, and was said to be firing out through a window. In that position, it could only fire at the sea or Žarkovica.<sup>628</sup> As has just been indicated, there are significant difficulties in the way of manoeuvring a weapon of this type into either the position described by Captain Pepić or that described by Captain Nešić. It is not conceivable that the same weapon is being described by these two witnesses, having been moved from one position to the other in the time between the two supposed sightings, especially as there was an ongoing military action at the time. For reasons already indicated, each suggested position for the anti-aircraft gun is highly impracticable and therefore highly improbable. On top of the tower, it was

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<sup>621</sup> Exhibit C1/1, p 19.

<sup>622</sup> The witness referred to it as "the right-hand tower in the Old Town port", Captain Nešić, T 8172.

<sup>623</sup> Captain Nešić, T 8172.

<sup>624</sup> Captain Nešić, T 8292; Exhibit D113.

<sup>625</sup> Captain Nešić, T 8270.

<sup>626</sup> Captain Nešić, T 8170; 8172, 8255.

<sup>627</sup> Captain Pepić, T 7486-7489; Exhibit D103, positions 1 and 4.

<sup>628</sup> Exhibit C1/1, p 19; Exhibit C1/2, "View of 3 windows of St. Luka from Žarkovica" and "View of 3 windows of St. Luka from St. John".

entirely exposed to JNA fire and could not readily be moved to a protected position.<sup>629</sup> Within the tower, it could not be used for its primary anti-aircraft role, when the need for anti-aircraft defence was glaringly obvious from the last JNA assault on 9-12 November. Nor could it be used against Srd. As noted above, each position was in the immediate and direct observation of the ECMM Monitors from their location, yet the presence of a weapon at either location was not observed.

189. The Chamber finds itself entirely convinced by the evidence of Captain Negodić that the *only* active anti-aircraft weapon of the Croatian defenders in this vicinity was located by the base of the cable car,<sup>630</sup> *i.e.* outside the Old Town in a position which offered some protection from JNA fire but from which it could be used against attacking JNA aircraft, Srd and Žarkovica. As regards the most southern tower, the Chamber points out that the existence of any weapon in this position was not recorded in the report concerning the use of his weapons prepared by Captain Nešić.<sup>631</sup> There is no explanation for the omission if there was in truth such a sighting by him that day. The position would involve the weapon being fired from a hard stone surface, or else suitable surface preparation, and there is no evidence of this. The report of Captain Nešić also refers to “the corner at the entrance to the Old Town (left one)”, where the barrel of a cannon was allegedly noticed.<sup>632</sup> However, no such weapon was indicated by Captain Nešić in that place on the map of the Old Town showing the location of alleged Croatian weapons on 6 December 1991.<sup>633</sup> No other information is given about this alleged sighting. Nor is it said that it was observed firing. Finally, both in his testimony and report, Captain Nešić referred to people carrying crates in the area of the fish market at the entrance to the Old Town.<sup>634</sup> The inference was that the crates contained ammunition. This seemed to be assumed because the crates were in colour and shape like JNA ammunition crates. The witness did not see the contents of those crates, nor anything being placed in or removed from them, nor that they were moved from or to any weapon position.<sup>635</sup>

190. The Chamber further notes that there is an abundance of other evidence that contradicts the testimony of Captains Drljan, Pepić and Nešić. Some witnesses excluded the presence of any heavy weaponry, armaments or artillery in the Old Town.<sup>636</sup> Ivo Grbić, Captain Negodić and Ivo Vlašica testified that no anti-aircraft weapon was located in the Old Town.<sup>637</sup> Nikola Jović and Per Hvalkof said there were no mortars there.<sup>638</sup> According to Jožef Poje, a military expert, the Old Town is not

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<sup>629</sup> Exhibit C1/1, p 19.

<sup>630</sup> Captain Negodić, T 5215-5216; 5221.

<sup>631</sup> Exhibit D113; Captain Nešić, T 8236-8237.

<sup>632</sup> Exhibit D113.

<sup>633</sup> Exhibit D110.

<sup>634</sup> Captain Nešić, T 8170-8171 ; 8240-8243; Exhibit D113.

<sup>635</sup> Captain Nešić, T 8171.

<sup>636</sup> Đelo Jusić T 3124, Zineta Oresta T 3494, Mato Valjalo T 2011, Per Hvalkof T 2221.

<sup>637</sup> Ivo Grbić, T 1451; Captain Negodić, T 5226 ; Ivo Vlašića, T 3362.

<sup>638</sup> Nikola Jović, T 2966; 3010-3011; 3014; Per Hvalkof, T 2219.

a favourable place for the firing of a mortar because of the dense population, the narrow streets and the high buildings, and because there are only hard firing surfaces.<sup>639</sup> Captain Negodić pointed out that the Old Town was made of stone and its streets are very narrow. It was his opinion that placing any weapon there would have caused more damage to the surrounding houses than to the enemy.<sup>640</sup> The narrowness of the streets and the height of the buildings would preclude a mortar being sighted on any anticipated JNA target in most locations.

191. The Chamber notes that, somewhat remarkably, no one of the Croatian weapons or firing positions allegedly observed in the Old Town on 6 December 1991 was noticed by more than one witness. None of them was observed by those on Srd which permitted the best and closest view of the Old Town. The other JNA witnesses were all at Žarkovica, with Captain Kovačević, yet purport to have made quite different observations. There is one other possible factor. Captains Pepić and Nešić stated that they were on Žarkovica during the November 1991 assault when shelling also occurred.<sup>641</sup> Given the lapse of time since those dates, it is possible that the witnesses have confused observations of events that took place during one or more earlier assaults.

192. The Chamber further observes that despite a clear order given by Admiral Jokić, by which enemy positions discovered in the Old Town were to be reported to the forward command post of the 9 VPS command,<sup>642</sup> the alleged presence of military positions in the Old Town was not reported in the JNA war logbook, which provides detailed information about Croatian military positions active on 6 December 1991.<sup>643</sup> Some indication of military activity can be found in the combat report of 6 December 1991 prepared by Warship-Captain Zec. That document contains reference to “fire occasionally opened from the Stradun region as well as the Old City Port”.<sup>644</sup> The basis for that assertion is not disclosed. That information is not supported by another combat report, written on 7 December 1991 by Admiral Jokić, containing reference to Croatian military positions located only outside of the Old Town.<sup>645</sup> As both officers would have had access to the same reports and messages, the difference between them is of interest. It was Admiral Jokić’s view that the report by Warship-Captain Zec did not “reflect the truth of what happened” and he did not agree with all the details.<sup>646</sup> Another report referring to positions in the Old Town is the one prepared by Captain

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<sup>639</sup> Jožef Poje, T 6224.

<sup>640</sup> Captain Negodić, T 5241. Per Hvalkof also doubted whether the Old Town was suitable for mortars, T 2219.

<sup>641</sup> Captain Pepić was there on 8 and 9 November 1991, T 7475-7477; Captain Nešić was there, among other periods, between 10 and 13 November 1991, T 8201.

<sup>642</sup> Exhibit D57, Section 5.4 ; Admiral Jokić, T 4972-4973.

<sup>643</sup> Exhibit D 96; Captain Pepić, T 7569-7573; Captain Drljan, T 7742-7744; 7772-7773.

<sup>644</sup> Exhibit D62, Section 1.

<sup>645</sup> Exhibit D65, Section 2.

<sup>646</sup> Admiral Jokić, T 4954-4956.

Nešić on the targets fired on from Žarkovica. However, the Chamber has found it to be deliberately contrived.<sup>647</sup>

193. The Chamber concludes that the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible. It further observes that the witnesses who claimed to have seen weapons located at those positions were at the material time JNA commanders or staff officers, or officers having responsibility for JNA artillery firing on the day. It appears thus that the question whether JNA fire on the Old Town was deliberate, or merely a response to defensive Croatian fire or other military positions, could have been thought by them to have a direct impact on the assessment of their performance or their exposure to disciplinary action. When all factors are weighed, including the directly contradicting evidence, the Chamber is entirely persuaded and finds that there were no Croatian firing positions or heavy weapons in the Old Town or on its walls on 6 December 1991.

194. The further question arises whether, even though there were in truth no Croatian firing positions or heavy weapons in the Old Town, it was believed by those responsible for the JNA shelling of the Old Town that there were. In this regard the primary finding of the Chamber is that the evidence of the existence of such firing positions or heavy weapons is in each case false, not that it is merely mistaken. Even if it were to be assumed for present purposes, however, that one, some or all of the firing positions or heavy weapons referred to in the evidence we have considered was believed to exist in the Old Town or on its walls, the evidence discloses that they were not treated as posing any significant threat to the JNA forces on the day. Captain Pepić said that he did not pay much attention to the anti-aircraft gun on the St. Luka tower because there was a different priority at that time. He mentioned the Hotel Libertas.<sup>648</sup> After having been fired at with one projectile, the anti-aircraft weapon allegedly located on the tower of St. Luka became silent.<sup>649</sup> Similarly, Captain Nešić considered that the “neutralisation” of the anti-aircraft gun allegedly positioned inside the same tower was not “any kind of major event” in the situation where, as he stated, they were being constantly fired at.<sup>650</sup> According to the evidence of both witnesses, the identified Croatian weapons were successfully “neutralised” without much effort. For the “elimination” of the mortar allegedly spotted on the most-southern tower the evidence suggests that one shell from a recoilless gun was sufficient.<sup>651</sup> The people said to be carrying crates were fired at with two or three projectiles, after which they did not return to the place where they had been

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<sup>647</sup> See *supra*, para 132.

<sup>648</sup> Captain Pepić, T 7527-7530.

<sup>649</sup> Captain Nešić, T 8236.

<sup>650</sup> Captain Nešić, T 8236.

<sup>651</sup> Captain Nešić, T 8238.

seen.<sup>652</sup> The mortar, described by Captain Pepić, became non-useable after fire was opened at it from Žarkovica.<sup>653</sup> There is no evidence to indicate that the mortar allegedly seen to fire in the Stradun, or the mortar allegedly firing from behind the Orlando column, was ever targeted by JNA artillery. Those carrying out the attack on Srd did not identify either position or any of the other weapons or positions discussed as a threat to them.

195. The Chamber further notes that the evidence of the alleged Croatian firing positions, even were it to be assumed to be true or that it was believed to be true, and if it were accepted in the version which is most favourable to the Defence, would not provide any possible explanation for, or justification of, the nature, extent and duration of the shelling of the Old Town that day, and the variety of positions shelled. In the Chamber's finding the evidence, even on the assumption identified, would preclude a finding that the JNA artillery was merely firing at Croatian military targets in the Old Town. There would be simply no relationship in scale between the evidence offered as the reason for the attack, and the JNA artillery response.

196. The Chamber now records aspects of the evidence of the Croatian military positions. A detailed description of the Croatian military positions in the town of Dubrovnik was given by Captain Negodić, who commanded the Croatian artillery defence on 6 December 1991, though not the anti-aircraft weapons. It was his evidence that two 82mm mortars were located from 100 to 120 metres to the east from the city walls of the Old Town, at Lazareti. As the main purpose of that position was to prevent a possible attempt by JNA infantry to breakthrough from the area between Bosanka and Žarkovica, the mortars did not fire on 6 December 1991.<sup>654</sup> Ammunition, which was in scarce supply because of the blockade, had been stored in readiness near that position, underneath steps leading down the wall. On 6 December 1991, two mortars and four shells were there.<sup>655</sup> Captain Negodić testified that a combat position for an anti-aircraft weapon was located outside the Old Town near the lower part of the cable-car which goes up to Fort Srd.<sup>656</sup> This position is about 150 metres from the wall of the Old Town. There was a position for an anti-aircraft weapon to the east from the Old Town, in the Ploče area, at Zlatni Potok. It is his evidence that the weapon placed there did not fire on 6 December 1991.<sup>657</sup> Captain Negodić said that there was a group of 10 or 15 infantry men in Gradac Park whose task was to prevent entry into a small harbour.<sup>658</sup> He also mentioned that in the park there was an alternative position for an anti-aircraft

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<sup>652</sup> Captain Nešić, T 8241-8243. In his report 4 projectiles are mentioned in this connection, Exhibit D113.

<sup>653</sup> Captain Pepić, T 7527-7530.

<sup>654</sup> Captain Negodić, T 5187-5189.

<sup>655</sup> Captain Negodić, T 5194-5195; Admiral Jokić, T 4963-4966 ; Exhibit P146.

<sup>656</sup> Captain Negodić, T 5221.

<sup>657</sup> Captain Negodić, T 5225-5226.

<sup>658</sup> Captain Negodić, T 5463-5464.

weapon.<sup>659</sup> Captain Negodić stated that on 6 December 1991 a 76mm ZIS cannon was positioned at Mala Petka. According to the witness, the weapon fired with four shells towards the area of Pobrežje and Knezovi. Captain Negodić said that, subsequently, the ammunition from that position was transferred to the position near the Iva Vojnovića street.<sup>660</sup> It was the Captain's testimony that even further to the northwest, near the camping ground of Solitudo, there was a position for three 120mm mortars and three 82mm mortars. On 6 December 1991 those weapons fired towards the fortress at Srd and Strinčjera.<sup>661</sup> A position for a three-barrel cannon was located near Solitudo at Orsan, Lazaret, which is far to the northwest from the Old Town. On 6 December 1991 that weapon fired towards the area of Srd.<sup>662</sup> An anti-aircraft weapon, a mobile 20mm single-barrelled gun, was positioned at the bay near the Lapad Hotel. It was deployed on 6 December 1991.<sup>663</sup> According to Captain Negodić, a single-barrel 128mm rocket-launcher was positioned on a small hill 150 metres north of the Libertas Hotel. On 6 December 1991 it fired one rocket at Žarkovica.<sup>664</sup> Two 82mm mortars were positioned near the SDK building. This is to the northwest and well away from the Old Town. On 6 December 1991 they fired at the area of the fortress of Srd, as well as the Žarkovica-Bosanka road.<sup>665</sup> The position was so well hidden that even when it was firing, it was not visible from the JNA positions.<sup>666</sup> After 1130 hours on that day the mortars positioned there were out of ammunition.<sup>667</sup> Captain Negodić testified that a 76mm ZIS cannon was positioned under a bridge at the Iva Vojnovića street. The testimony of the witness was that on 6 December 1991 that cannon fired with about 170 shells at the area of the fortress of Srd and at Žarkovica.<sup>668</sup> He further referred to a Maljutka positioned near the President Hotel<sup>669</sup> and a recoilless cannon located at a small bay at Solitudo,<sup>670</sup> neither of which was deployed on 6 December 1991.

197. The Chamber notes that a number of the positions described by Captain Negodić were not referred to in the evidence of any JNA witness and in particular they were not mentioned by the witnesses who participated in the attack on Srd. Therefore, the testimony of Captain Negodić relating to those positions will be of limited relevance to the analysis of the JNA shelling of the Old Town, or indeed of the shelling of the wider Dubrovnik area. The Chamber found the evidence of

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<sup>659</sup> Captain Negodić, T 5215-5216.

<sup>660</sup> Captain Negodić, T 5182-5186 ; 5430; Exhibit P159.

<sup>661</sup> Captain Negodić, T 5174-5175 ; 5430 ; Exhibit P159.

<sup>662</sup> Captain Negodić, T 5213-5214 ; Exhibit P160.

<sup>663</sup> Captain Negodić, T 5215, 5323; Exhibit P160.

<sup>664</sup> Captain Negodić, T 5176-5179; Exhibit P159.

<sup>665</sup> Captain Negodić, T 5186-5187.

<sup>666</sup> Captain Negodić, T 5343.

<sup>667</sup> Captain Negodić, T 5233 and 5428.

<sup>668</sup> Captain Negodić, T 5180-5181, 5395-5396, 5422-5424.

<sup>669</sup> Captain Negodić, T 5167-5168; Exhibit P159.

<sup>670</sup> Captain Negodić, T 5170-5173; Exhibit P159.

Captain Negodić to be impressive for its factual foundation and thoroughness and the apparent reliability. While he was not directly responsible for anti-aircraft weapons he had a sound overview of them and a first hand knowledge of the other artillery of the Croatian forces.

198. The Chamber must weigh other evidence, however, relating to possible Croatian firing or other military positions not identified by Captain Negodić. Captain Nešić testified that he observed firing from the road which is lower and parallel to the main road above Dubrovnik. According to the witness, it was a “Flying Charlie”, *i.e.* a mortar mounted on a small truck.<sup>671</sup> It appears that the weapon described by the witness did not pose a threat to the JNA, since the witness’ unit did not attempt to neutralise it.<sup>672</sup> According to Captain Nešić, there was also a mortar in the area of the Excelsior Hotel.<sup>673</sup>

199. Lieutenant Lemal said that fire from Croatian mortars located at Lapad was directed in the direction of Srd at around 0900 – 0930 hours in the morning of 6 December 1991, involving casualties among his soldiers.<sup>674</sup> He also testified that Croatian mortars had been seen at Velika Petka, near the Ispod Petka street.<sup>675</sup> Lieutenant Lemal stated that he too observed a mobile mortar unit, he called it a “Charlie”, moving along the Iva Vojnovića street from the Libertas Hotel to Lenin’s Boulevard.<sup>676</sup>

200. It was Admiral Jokić’s evidence that on 6 December 1991 fire was opened from Croatian positions located at the northern part of the Lapad peninsula, referred to as Babin Kuk or Lazaret.<sup>677</sup> While this could be an imprecise reference to the Solitudo position identified by Captain Negodić, the precise positions are different. Lieutenant-Colonel Jovanović said that between 0600 and 0700 hours Captain Kovačević had informed him about firing from that area,<sup>678</sup> as well as after 0900 hours in the morning.<sup>679</sup> A number of the Defence witnesses testified that in the morning on 6 December 1991 heavy fire was opened from 82mm mortars positioned at the tennis courts near the Libertas Hotel.<sup>680</sup> Captain Pepić and Lieutenant Pesić spoke of two mortars, while Captain

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<sup>671</sup> Captain Nešić, T 8174, 8273.

<sup>672</sup> Captain Nešić, T 8274-8275.

<sup>673</sup> Captain Nešić, T 8177. Admiral Jokić also referred to a mortar positioned nearby the Excelsior Hotel. However, the position marked by the witness on map P146 is to the north-east from the hotel, T 4968-4969; Exhibit P146.

<sup>674</sup> Lieutenant Lemal, T 7413-7415, 7373-7374; the witness stated that his troops entered Srd at around 0830 hours and the fire from Lapad was opened within 30 minutes to 1 hour after that moment.

<sup>675</sup> Lieutenant Lemal, T 7357.

<sup>676</sup> Lieutenant Lemal, T 7356.

<sup>677</sup> Admiral Jokić, T 4092. As regards the name of that area: Lieutenant-Colonel Jovanović, T 8119, and Exhibit P159.

<sup>678</sup> Lieutenant-Colonel Jovanović, T 8082.

<sup>679</sup> Lieutenant-Colonel Jovanović, T 8119-8120; reference to mortar fire or Croatian defenders in that area is made in Exhibit D65.

<sup>680</sup> Lieutenant-Colonel Jovanović, T 8084-8085; 8119-8120; Lieutenant Lemal, T 7356; 7358 (the witness referred to a position near the letter K in “Kotorska Ulica” and numeral 20 on the map P10, which is the area of the tennis courts); Captain Nešić, T 8174; 8272; Exhibit D111 (the witness spoke of a “clearing” behind the Libertas Hotel, but the position marked by him on the map D111 corresponds with that of the tennis courts); Captain Pepić, T 7484-

Nešić mentioned four. The firing from those mortars was said to have inflicted losses to the JNA units attempting to enter the fortress of Srd.<sup>681</sup> The Chamber observes that despite having been present at Gospino Polje, which is 200-300 metres from the tennis courts,<sup>682</sup> Captain Negodić did not identify a firing position at the tennis courts in his testimony. The Chamber records that whether or not there were Croatian mortars firing from these tennis courts on 6 December 1991, it accepts that those on Srd believed that there were and that JNA defensive fire was directed to these tennis courts. The Chamber has also heard testimony relating to Croatian military positions at Kantafig, Gruž, Nuncijata and Sustjepan,<sup>683</sup> as well as machine gun fire opened from near the Hotel Argentina<sup>684</sup> and a group of Croatian defenders allegedly located at the Belvedere Hotel.<sup>685</sup>

201. Further, there are two places in the vicinity of the Old Town as to which the Chamber heard a lot of conflicting evidence, *viz.* Bogišića Park and Gradac Park. Admiral Jokić testified that the information given to him was that four 82mm mortars were positioned in the Bogišića Park and fired at Srd on 6 December 1991.<sup>686</sup> Captain Nešić referred in his testimony to a mortar firing from that park.<sup>687</sup> While Ivo Grbić said he had heard about members of the Croatian army located in the park, that evidence did not refer specifically to 6 December 1991.<sup>688</sup> However, it was the evidence of Captain Negodić that two mortars were placed in the Bogišića Park, but only for one morning in the first half of November 1991, most likely between the 8th and 13th.<sup>689</sup> Colin Kaiser confirmed that he was surprised when an investigator from the Prosecution told him about mortar fire allegedly opened from the Bogišića Park, because from his mission the witness had never seen anything that would indicate that Croatian defenders had been operating such weapons so near the Old Town.<sup>690</sup>

202. As regards Gradac Park, evidence has been presented concerning mortars allegedly positioned there. Admiral Jokić said that, according to information available to him, throughout the

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7485; 7501; 7571; Lieutenant Pesić, T 7898-7900; 7922-7923 (the witness mentioned tennis courts at Babin Kuk, but in the absence of evidence of firing from any tennis courts at Babin Kuk and in view of the evidence to the effect that the tennis courts from which fire was opened were near the Libertas Hotel, the witness appears to have meant the latter place); Exhibit D65.

<sup>681</sup> Lieutenant-Colonel Jovanović, T 8084-8085; Captain Pepić, T 7485.

<sup>682</sup> Captain Negodić, T 5233.

<sup>683</sup> Nikola Jović, T 3010; 3018-3019; Captain Negodić, T 5354; Mato Valjalo, T 1998; 2056-2057; Lieutenant-Colonel Jovanović, T 8082-8083; 8112-8113; Lieutenant Lemal, T 7359; Captain Pepić, T 7569-7573; Exhibits D96 (p 70) and D65.

<sup>684</sup> Per Hvalkof, T 2345.

<sup>685</sup> Witness A, T 3687-3688; Nikola Jović, T 3010; Ivo Vlašica, T 3415.

<sup>686</sup> Admiral Jokić, T 4966; Exhibit P146.

<sup>687</sup> Captain Nešić, T 8177; Exhibit D111; the witness referred to the “park behind the Imperial Hotel”. For the location of the Imperial Hotel see Exhibit P10.

<sup>688</sup> Ivo Grbić, T 1414-1418.

<sup>689</sup> Captain Negodić, T 5191-5192; 5261; 5338.

<sup>690</sup> Colin Kaiser, T 2525.

duration of the Dubrovnik operation, a 120mm mortar was located in Gradac Park.<sup>691</sup> He specifically referred to that military position as one of those at which Croatian weapons were located on 6 December 1991.<sup>692</sup> Nikola Jović believed that the Croatian army might have had some mortars or cannons at Gradac Park.<sup>693</sup> Ivan Mustac was even less specific saying that on 6 December 1991 one or several mortars were used in relation to the battle around the fortress on Srđ, and he could not exclude that they were located at Gradac.<sup>694</sup> Captain Nešić testified that on 6 December 1991 he saw from Žarkovica an artillery piece located in Gradac Park.<sup>695</sup> In contrast, it was the evidence of Captain Negodić that there had never been any mortars positioned in Gradac Park.<sup>696</sup> There is also evidence that Gradac Park was used for a ZIS cannon. On the video tendered by Ivo Grbić there is footage from Gradac Park which shows that a ZIS cannon is located there.<sup>697</sup> Captain Negodić testified that a ZIS cannon was positioned in Gradac Park towards the end of December 1991.<sup>698</sup> He also said that there was a group of 10 or 15 infantry men in Gradac Park whose task was to prevent entry into a small harbour,<sup>699</sup> and that in the park there was an alternative position for an anti-aircraft weapon.<sup>700</sup>

203. The firing positions described in the preceding paragraphs are located various distances from the Old Town. All are outside the Old Town. Some of them are so remote from the Old Town that any attempt to neutralise them by the JNA forces, even using the most imprecise weapons, could not affect the Old Town. As regards the positions which are closer to the Old Town, the Chamber heard expert evidence as to which positions in the vicinity of the Old Town, if targeted by the JNA, would give rise to a risk of incidental shelling of the Old Town.

204. Jožef Poje, a ballistics expert for the Prosecution, assessed the dispersion patterns for mortar shells targeted at various positions in the vicinity of the Old Town. It was assumed by Mr Poje that they would be fired at from Žarkovica, Bosanka, Uskoplje and Srđ by 82mm and 120mm mortars. The targets included Ploče, Bogišića Park, a position located about 150-200 metres north of the Old Town at the foot of the cable car, and Gradac Park. The expert concluded that the targeting of any of those positions by the JNA forces would not lead to shells falling on the Old Town, except for

<sup>691</sup> Admiral Jokić, T 3920-3921. The witness referred to it as “the park near the old hospital” or “Pile park”. The park near the old hospital is Gradac Park, Zineta Oresta, T 3498.

<sup>692</sup> Admiral Jokić, T 4965-4966.

<sup>693</sup> Nikola Jović, T 3010-3011.

<sup>694</sup> Ivan Mustac, T 1521.

<sup>695</sup> Captain Nešić, T 8272.

<sup>696</sup> Captain Negodić, T 5193-5194.

<sup>697</sup> Ivo Grbić, T 1419. Although the scene is included in the part of the material purportedly relating to 4 November 1991, there is no evidence which would make it possible to verify the precise date of the footage (Exhibit P66). Therefore, the footage has not much probative value, especially for the purpose of establishing whether the military position was active on 6 December 1991.

<sup>698</sup> Captain Negodić, T 5194.

<sup>699</sup> Captain Negodić, T 5463-5464.

the one position at the foot of the cable car to the north of the Old Town, if fired at from Uskoplje with a 120mm mortar.<sup>701</sup> This evidence was based on JNA dispersion tables. Some of the target and firing positions assumed by Mr Poje are not relevant because the evidence does not establish that they were targets or firing points respectively.<sup>702</sup> While both 82mm and 120mm dispersion patterns are given for each firing position, no doubt out of caution, the evidence shows that only one or other was used at each firing point. The measurement of distances of target points to the Old Town was not accurate in every case,<sup>703</sup> which has an effect in one case in particular – the foot of the cable car<sup>704</sup> – and the Chamber notes that no account was taken of weather conditions on 6 December 1991,<sup>705</sup> whereas weather conditions can affect the dispersion pattern of shells as they land in the target area.

205. The Defence called another ballistics expert, Janko Viličić. The Chamber observes that it is quite difficult to relate the factual basis on which this expert formed his opinions to the evidence on which the Chamber must decide this case. He has, for example, identified, as JNA firing positions for mortars, locations which are not mentioned in the evidence led before the Chamber, and he has not dealt with some positions which are shown to have been JNA firing positions on 6 December 1991.<sup>706</sup> As a further example, critical to the factual basis on which he has reached a material opinion are calculations or deductions he has made about the amount of ammunition that he believes must have been expended by various JNA firing positions on the day. These deductions appear to be based, *inter alia*, on a witness statement which is not in evidence.<sup>707</sup> Further, a war diary referred to by the expert in this connection, does not contain information on which the expert appears to have based one of his conclusions. Mr Viličić relies on that diary to show the number of shells fired from three JNA positions,<sup>708</sup> despite the fact that the diary makes no reference to firing at any of the alleged Croatian positions mentioned in his report. The diary provides detailed figures only in respect of the Croatian positions at Lazaret, the Neptun Hotel, Libertas Hotel, Nuncijata and Sustjepan.<sup>709</sup> The expert's conclusion based on these figures was that the number of shells was considerably lower than that required by JNA norms for neutralising firing positions.<sup>710</sup> Mr Viličić relies on the evidence of Captain Negodić to show that the presence of "Flying Charlie" vehicles in

<sup>700</sup> Captain Negodić, T 5215-5216.

<sup>701</sup> Jožef Poje, T 6208-6210; 6217-6218; 6222; Exhibit P184/2a ; 184/4.

<sup>702</sup> Jožef Poje admitted that if there were no 120mm mortars located at Žarkovica, Bosanka and Srd, part of his conclusions would be irrelevant, T 6318.

<sup>703</sup> Jožef Poje, T 6399-6410; 6402-6404; 6405.

<sup>704</sup> Jožef Poje, T 6402-6404.

<sup>705</sup> Jožef Poje, T 6321.

<sup>706</sup> Exhibit D115, pp 5-6.

<sup>707</sup> Exhibit D115, fn 66.

<sup>708</sup> Exhibit D115, p 89.

<sup>709</sup> Exhibit D96, p 68.

<sup>710</sup> Exhibit D115, p 89.

the vicinity of the Old Town increased the risk of projectiles landing in the Old Town,<sup>711</sup> whereas that witness ruled out the possibility of such vehicles being used by the Croatians.<sup>712</sup> One critical factual basis for his most material opinion is that at no time on 6 December 1991 did JNA forces ever target the Old Town.<sup>713</sup> This, in the Chamber's finding, is an entirely false factual basis.

206. Mr Viličić also placed very considerable reliance on the weather conditions which he assumed prevailed on 6 December 1991. It was his opinion that on 6 December 1991, these significantly affected the dispersion patterns for mortar shells. However, he did not have actual weather details for 6 December 1991.<sup>714</sup> Instead, his opinion in this respect is based on assumed weather conditions which are based on generally prevailing or average weather conditions for the month of December.<sup>715</sup> Wind conditions in particular affect his calculations. In respect of the actual wind conditions on the day, there are clear visual indications in the video evidence of wind conditions quite different from those assumed by Mr Viličić for his calculations.<sup>716</sup> The Chamber points out that the expert himself regarded the wind direction as one of the most important meteorological conditions and wrote in his report that wrongly determined weather conditions could cause errors in preparing initial firing data.<sup>717</sup>

207. It was assumed by Mr Viličić that JNA forces fired with 120mm mortars from Ledenica, with 76mm ZIS cannons from the Vraštica sector, with 82mm mortars from the Dubac and Rajčevići sector, and with 82mm mortars from Strinčijera. His report considers as targets hypothetical Croatian positions at Srd, Bogišića Park, Gradac Park, as well as positions located 200 metres east of Ploče, 100 metres north of the Old Town and 500 metres west of the Old Town.<sup>718</sup> It was the opinion of Mr Viličić that on 6 December 1991, given the meteorological conditions he had assumed, firing with mortars from those assumed JNA firing positions at any target which was less than 500 metres from the Old Town would lead to at least some of the shells landing in the Old Town.<sup>719</sup> In his opinion, 500 metres was the minimum safe distance for a target.<sup>720</sup> It followed in his opinion that by having firing positions within 500 metres of the Old Town, the Croatian defenders imperilled the Old Town. His opinion went even further. It was his opinion that all the damage to the Old Town on 6 December 1991 could have been caused by JNA mortars targeted at

<sup>711</sup> Exhibit D115, pp 88, 97 and 98.

<sup>712</sup> Captain Negodić, T 5234; 5344-5345; 5367.

<sup>713</sup> Exhibit D115, p 98; Janko Viličić, T 8365.

<sup>714</sup> Janko Viličić, T 8317.

<sup>715</sup> Exhibit D115, Annex 5.

<sup>716</sup> The expert assumed that there was a Bura wind on 6 December 1991, T 8317-8319. The main direction of the Bura wind is from north-east to south-west, T 8405, whereas the video evidence available to the Chamber shows a wind blowing from the south to the north, Exhibit P78; Exhibit P66 at 31:19.

<sup>717</sup> Exhibit D115, p 42.

<sup>718</sup> Janko Viličić, T 8305; 8345; 8346 and 8356.

<sup>719</sup> Janko Viličić, T 8349-8350.

<sup>720</sup> Janko Viličić, T 8348-8349.

Croatian military positions outside the Old Town, but within 500 metres of it. In other words, it is the effect of his opinion that none of the damage to the Old Town was intended by the JNA. It did not result from intentional shelling of the Old Town, but, in the conditions prevailing, occurred because the Croatian defenders imperilled the Old Town by the placement of their military positions.

208. The Chamber is not able to accept the opinions of Mr Viličić. For the reasons already indicated they are based, in material respects, on assumed factual bases which do not accord with the evidence. In addition to those matters, his opinions as to where JNA mortar shells would have predominantly fallen in the Old Town do not accord with this Chamber's findings as to the actual distribution of damage in the Old Town.<sup>721</sup> Further, the extent of damage is far greater than is attributable to the number of shells he assumes the JNA fired that day. And his assumptions do not allow for any deliberate targeting of the Old Town, or of shipping in the old port immediately outside the Old Town, by the JNA on 6 December 1991, whereas the evidence has established that each of those things occurred.

209. There are even further reasons which caution against the acceptance of Mr Viličić's opinions. Even if it is assumed that all the Croatian military positions relied on by Mr Viličić, which were within 500 metres of the Old Town, actually existed on 6 December 1991, which is not the finding of the Chamber, the evidence indicates that some of them were not known to the JNA on the day, or if known were not considered worthy of serious attention. Croatian firing positions at the cable car and in the Ploče area, east of the Old Town, were mentioned only by the officer in charge of the Croatian artillery, Captain Negodić, while the former JNA commanders and witnesses did not refer to them in their testimony.<sup>722</sup> Other positions in close proximity to the Old Town are said to have been observed by some of the JNA witnesses.<sup>723</sup> But, they were not regarded as of primary concern, since they do not appear in JNA reports and records. Only the report prepared by Captain Nešić makes reference to the position at the tunnel near the Lovrijenac fortress, which in Captain Nešić's testimony was in Gradac Park.<sup>724</sup> However, even if the report were to be believed, which is not the position of the Chamber, it provides that the number of shells fired at that position was five.<sup>725</sup> Five is far less than required, according to the references referred to by Mr Viličić, for "neutralising" an enemy weapon. Therefore, Mr. Viličić's calculations in this respect were on the basis of far more JNA shells directed at this position than five. As pointed out above, there were no

<sup>721</sup> Exhibit D115, pp 94a and 94b; *see infra* the Chamber's findings as to the objects damaged on 6 December 1991, paras 316-330; *see Annex I*.

<sup>722</sup> Captain Pepić even testified that he did not observe any firing from the slopes of Srd in the area of the Old Town, T 7501.

<sup>723</sup> Bogišića Park and Gradac Park, *see supra* paras 201-202.

<sup>724</sup> Exhibit D113; Captain Nešić, T 8174 and 8272.

attempts to fire at the “Flying Charlie” allegedly observed by Captain Nešić,<sup>726</sup> the presence of which, in the opinion of Mr Viličić, increased the number of impacts of mortar shells within the walls of the Old Town. The attackers seem to have been much more focused on the firing positions well outside the Old Town, especially near the Libertas Hotel and at Babin Kuk, and also at Solitudo or Lazaret.<sup>727</sup> The Chamber considers that in view of these matters the issue whether the targeting of firing points in close proximity to the Old Town led to the damage on 6 December 1991 becomes theoretical rather than real.

210. It should also be noted that in an apparent attempt to be of as much assistance as possible to the Chamber, the Prosecution expert, Mr Poje, assumed that there was targeting by the JNA of each of the Croatian military positions identified in his report. That is not shown to be the case. The reports of both experts should not be taken as evidence that the Croatian positions assumed in those reports were in fact targeted. In the case of the Defence expert, Mr Viličić, but not in the case of the Prosecution expert, Mr Poje, Mr Viličić went on to express opinions which assumed that there was targeting of those Croatian positions, *i.e.* the opinion that all the damage to the Old Town could have been caused by JNA mortars targeted at Croatian positions outside the Old Town. The evidence does not support that assumption, nor does it provide a foundation for the view that all of them might have been targeted. As Mr Poje did not venture into such issues, his report is not affected in this respect. On another aspect, the Chamber accepts that regard is appropriate to the weather conditions on 6 December 1991 in assessing the dispersion to be anticipated of mortar shells fired at specific targets. As this is not apparently taken into account by Mr Poje, his opinion cannot be accepted without a degree of reservation. There are other differences between the approaches of the two experts but, in the Chamber’s appreciation of the issues they raise, what has been considered already is sufficient to indicate why neither report is able to be directly applied by the Chamber. While Mr Poje’s report can only be accepted by the Chamber with reservation, the Chamber finds it is unable to accept the opinions of Mr Viličić because there are so many matters on which his report is based which are not established, or which are contradicted by the evidence.

211. In the Chamber’s finding, the most that can be made of the evidence of the experts is that if Croatian military positions, outside, but in close proximity to, the Old Town, had in fact been targeted by JNA mortars on 6 December 1991, it is possible that some of the shells fired might have fallen within the Old Town. For reasons already given, few of the possible Croatian military targets considered by the experts were the subject of JNA targeting by mortars, and none of them were the subject of intensive or prolonged firing. In view of the above-mentioned shortcomings of the expert

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<sup>725</sup> Exhibit D113.

<sup>726</sup> Captain Nešić, T 8274.

<sup>727</sup> Captain Pepić, T 7527-7530; Exhibit D113; Exhibit D96, pp 67-75.

reports and the differences between them, the Chamber is unable to rely exclusively on one or the other in determining which targets in close proximity to the Old Town could give rise to a risk of incidental shelling of the Old Town. Given the seriousness of its reservations in respect of the report of Mr Viličić and the disparity between his opinions and those of Mr Poje, the Chamber is not able to accept his opinion that targeting a position less than 500 metres from the Old Town walls could result in mortar shells landing in the Old Town on 6 December 1991. In any event, the Chamber observes that both expert reports almost concordantly state that the alleged positions at the Bogišića and Gradac Parks, which are the only two positions in the vicinity of the Old Town identified by some JNA witnesses, could not pose a significant threat to the Old Town. Even the report of Mr Viličić states that the shelling of the Bogišića Park would not result in shells landing in the Old Town once corrections had been made to the firing data.<sup>728</sup> On the other hand, the only target in close proximity to the Old Town, which both experts regarded as dangerous to the Old Town, was the position at the foot of the cable car.<sup>729</sup> This was referred to only in the testimony of Captain Negodić. Neither the JNA witnesses nor the JNA reports or other documents make reference to that position. There is no evidence that this position was actually targeted by the JNA on 6 December 1991.

212. At trial the suggestion was put to some witnesses that the shelling of the Old Town resulted from errors made by the Croatian defenders firing in particular from the area of Babin Kuk. However, the Chamber notes, for example, that the firing position at the Solitudo camp is located at some distance from the Old Town and the direct line from there to Žarkovica does not pass over the Old Town but to the landward side of it.<sup>730</sup> Therefore, this suggestion does not appear to be a practical reality. As regards the position under the bridge at Iva Vojnovića Street, the ZIS-cannon placed there could not successfully target the Old Town, because it is a direct line-of-sight firing weapon and the Old Town cannot be seen from that position.<sup>731</sup> The possibility of the Croatians firing erroneously into the Old Town was directly discounted by Captain Negodić, who pointed out that the trajectories of missiles fired towards Srd and Žarkovica did not pass over the Old Town.<sup>732</sup> The witness also ruled out a suggestion that any of the Croatian units or individuals would have fired into the Old Town intentionally.<sup>733</sup> Jožef Poje was of a similar view as regards the trajectories and described the probability of erroneous targeting of the Old Town as “very small and above all

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<sup>728</sup> Exhibit D115, pp 51-53; 59-60.

<sup>729</sup> Exhibit P184/5. The report of Mr Viličić does not refer to the foot of the cable car itself, but to a position located 100 metres north of the Old Town. However, the location of that position is very close to that of the cable car. Exhibit D115, pp 77-85; T 8345.

<sup>730</sup> Exhibit C1/1, p 10.

<sup>731</sup> Exhibit C1/1, p 12.

<sup>732</sup> Captain Negodić, T 5276.

<sup>733</sup> Captain Negodić, T 5276.

theoretical".<sup>734</sup> The Chamber regards the suggestion of intentional targeting to be extreme and so improbable or theoretical that it can be disregarded. With regard to the suggestion that error by the Croatian artillery caused damage to the Old Town, the only support in the evidence is an opinion expressed by the Defence expert, Mr Viličić, that one shell hole in the pavement of Stradun, near the St Blaise church, was caused by a mortar shell from the west. Mr Viličić noted that debris had been thrown to the west of the hole, while concrete slabs were raised on the eastern side of the hole.<sup>735</sup> He was of the view that the material coming from the hole was thrown backwards to the side where the angle of the mortar projectile was smaller relative to the ground. On this basis Mr Viličić concluded that the shell must have come from the west.<sup>736</sup> The Chamber approaches this testimony with caution, as the expert did not inspect the place himself and relied only on video shots, nor was there any certainty that the material around the hole had not been moved before the video had been made.<sup>737</sup> This is of particular importance in view of the evidence of extensive cleaning-up operations after the shelling,<sup>738</sup> some evidence of which in that vicinity can be seen in the video. Importantly, this proposition of Mr Viličić was not put to the Prosecution expert, so that there has been no opportunity for the Prosecution expert to assist the Chamber on this issue. The Chamber considers that, given its weak foundation and the abundance of evidence to the contrary, this proposition must be disregarded.

213. There is some other evidence of relevance in this context. Witness B testified that on 6 December 1991 the JNA soldiers on Žarkovica were free to target whatever they wanted.<sup>739</sup> He did not hear anyone mention that they were targeting a military position in the Old Town.<sup>740</sup> According to Witness B, Captain Kovačević said that if Dubrovnik did not surrender by a certain time, it would be attacked.<sup>741</sup> Similarly, Captain Negodić gave evidence of having overheard an intercepted conversation between a JNA soldier and a captain, during which the latter said that everything was a target within the walls of the Old Town.<sup>742</sup>

214. In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces. In part the JNA forces did target Croatian firing and other military positions, actual or believed, in Dubrovnik, but none of them were in the

<sup>734</sup> Jožef Poje, T 6232; Exhibit P184/1, p 27.

<sup>735</sup> Exhibit P78 at 19:27; Exhibit P145 at 00:58.

<sup>736</sup> Janko Viličić, T 8361-8363; 8369-8380; 8500-8504.

<sup>737</sup> Janko Viličić, T 8380-8381.

<sup>738</sup> See *supra*, para 178.

<sup>739</sup> Witness B, T 5046-5047.

<sup>740</sup> Witness B, T 5047.

<sup>741</sup> Witness B, T 5103.

Old Town. These Croatian positions were also too distant from the Old Town to put it in danger of unintended incidental fall of JNA shells targeted at those Croatian positions. It is the finding of the Chamber that the cause of the established extensive and large-scale damage to the Old Town was deliberate shelling of the Old Town on 6 December 1991, not only by JNA mortars but also by other JNA weapons such as ZIS and recoilless cannons and Maljutka rockets.

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<sup>742</sup> Captain Negodić, T 5266-5267.

## V. JURISDICTION UNDER ARTICLE 3 OF THE STATUTE

### A. Existence of an armed conflict and nexus between the acts of the Accused and the armed conflict

215. All the crimes contained in the Indictment are charged under Article 3 of the Statute of this Tribunal. For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed.<sup>743</sup> Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be “closely related” to the hostilities.<sup>744</sup> The Appeals Chamber considered that the armed conflict “need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.<sup>745</sup>

216. With regard to the issue of the nature of the conflict, it has been established in the jurisprudence of the Tribunal that Article 3 of the Statute is applicable regardless of the nature of the conflict.<sup>746</sup> In the present case, while the Prosecution alleged in the Indictment that an *international* armed conflict and partial occupation existed in Croatia at the time of the offences,<sup>747</sup> both parties concur in saying that the nature of the conflict does not constitute an element of any of the crimes with which the Accused is charged. The Chamber will therefore forbear from pronouncing on the matter and limit itself to the analysis, where necessary, of the applicability of the international treaties on which specific counts are based.

217. As will be apparent from what has been said already in this decision, the evidence establishes that there was an armed conflict between the JNA and the Croatian armed forces throughout the period of the Indictment.<sup>748</sup> These were each forces of governmental authorities, whether of different States or within the one State need not be determined. The offences alleged in the Indictment all relate to the shelling of the Old Town of Dubrovnik, which was a significant part of this armed conflict. It follows that the acts with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.

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<sup>743</sup> As the Appeals Chamber ruled, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State” (*see Tadić Jurisdiction Decision*, para 70).

<sup>744</sup> *See, among other authorities, Tadić Jurisdiction Decision*, para 70, *Naletilić Trial Judgement* para 225, *Krnojelac Trial Judgement*, para 51.

<sup>745</sup> *Kunarac Appeals Judgement*, para 58.

<sup>746</sup> *Tadić Jurisdiction Decision*, para 94, *Furundžija Trial Judgement*, para 132 and *Čelebići Trial Judgement*, para 314.

<sup>747</sup> Indictment, para 6.

<sup>748</sup> *See supra*, paras 99-119; 121-145.

## B. The four *Tadić* conditions

218. The Appeals Chamber in the *Tadić* case observed that Article 3 functions as a “residual clause” designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the Tribunal. In the Appeals Chamber’s view, this provision confers on the Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5 of the Statute, on the condition that the following requirements are fulfilled: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>749</sup> It is the view of the Chamber that these conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not.<sup>750</sup> Accordingly, the Chamber will discuss whether the offences with which the Accused is charged meet the four *Tadić* conditions.

### 1. Murder and cruel treatment

219. In the present case, the charges of cruel treatment and murder are brought under common Article 3 (1) (a) of the Geneva Conventions.<sup>751</sup> At the outset, the Chamber notes that the jurisprudence of the Tribunal in relation to common Article 3 is now settled. The Chamber will therefore not discuss it in detail but simply recall the main principles. First, it is well established that Article 3 of the Statute covers violations of common Article 3.<sup>752</sup> The crimes of murder and cruel treatment undoubtedly breach a rule protecting important values and involving grave consequences for the victims. Further, it is also undisputed that common Article 3 forms part of

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<sup>749</sup> *Tadić* Jurisdiction Decision, paras 91 and 94.

<sup>750</sup> *Tadić* Trial Judgement, para 610; *Čelebići* Trial Judgement, para 279; *Kunarac* Trial Judgement, para 403; *Kvočka* Trial Judgement, para 123; *Krnojelac* Trial Judgement, para 52; *Vasiljević* Trial Judgement, para 26; *Stakić* Trial Judgement, para 580; *Galić* Trial Judgement, para 11; *Brđanin* Trial Judgement, para 129.

<sup>751</sup> Common Article 3(1)(a) of the Geneva Conventions provides that:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...].”

<sup>752</sup> *Tadić* Jurisdiction Decision, para 89: “it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: [...] violations of common Article 3 and other customary rules on internal conflict [...].” This finding was confirmed in the *Čelebići* Appeals Judgement, at para 136.

customary international law applicable to both internal and international armed conflicts<sup>753</sup> and that it entails individual criminal responsibility.<sup>754</sup> Thus, the Chamber finds that the four *Tadić* conditions are met in respect of these offences.

## 2. Attacks on civilians and civilian objects

### (a) Attacks on civilians

220. The Chamber notes that Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, on which Count 3 is based, clearly set out a rule of international humanitarian law. Therefore, the first *Tadić* condition is fulfilled.<sup>755</sup> As regards the second condition, the Chamber recalls the ruling given in the present case and upheld by the Appeals Chamber, according to which the prohibition of attacks on civilians stated in the Additional Protocols attained the status of customary international law and the Additional Protocols' provisions at issue constitute a reaffirmation and reformulation of the existing customary norms.<sup>756</sup> It is to be noted that the Additional Protocols relate to specific types of armed conflicts. However, the prohibition of attacks on civilians is included in both Additional Protocols, of which Protocol I deals with international armed conflicts and Protocol II with non-international armed conflicts. Therefore, the nature of the conflict is of no relevance to the applicability of Article 3 of the Statute. The Chamber thus finds that the second *Tadić* requirement is met.

221. As regards the third *Tadić* requirement, the prohibition of attacks on civilians is one of the elementary rules governing the conduct of war and undoubtedly protects "important values".<sup>757</sup> The Chamber considers that any breach of this prohibition encroaches upon the fundamental principle of the distinction between combatants and non-combatants.<sup>758</sup> This principle has developed throughout the history of armed conflict with the purpose of keeping civilians from the danger arising from hostilities. The Chamber points out that attacks on civilians jeopardise the lives or health of persons who do not take active part in combat. It is of the view that the imminent risk of falling victim of an unlawful attack is in itself an acute experience for civilians, who, unarmed and defenceless, find themselves facing an army that has chosen them as its target. The Chamber

<sup>753</sup> *Tadić* Jurisdiction Decision, para 98 and 134; *Čelebići* Appeals Judgement, para 139; *Kunarac* Trial Judgement, para 406; *Kvočka* Trial Judgement, para 124.

<sup>754</sup> *Tadić* Jurisdiction Decision, para 129. While the Appeals Chamber found that common Article 3 contains no explicit reference to criminal liability for violation of its provisions, it relied on the findings of the International Military Tribunal at Nuremberg, on State practice, national legislation, including the law of the former Yugoslavia, Security Council resolutions and the agreement reached under the auspices of the ICRC on 22 May 1992. Its finding was confirmed in the *Čelebići* Appeals Judgement, para 174.

<sup>755</sup> *Galic* Trial Judgement, para 16.

<sup>756</sup> *Strugar* Trial Chamber Decision on Jurisdiction, paras 17-21, and *Strugar* Appeals Chamber Decision on Jurisdiction, para 9; see also *Tadić* Jurisdiction Decision, para 127 and *Blaškić* Appeals Judgement, paras 157-158.

<sup>757</sup> *Galic* Trial Judgement, paras 27 and 45; ICRC Commentary on Additional Protocols, p 615.

emphasises that the categorical nature of the prohibition of such attacks<sup>759</sup> and its prominent place among the rules of international humanitarian law make it evident that the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities. The Chamber is of the opinion that the experiencing of such a risk by a civilian is in itself a grave consequence of an unlawful attack, even if he or she, luckily, survives the attack with no physical injury. Accordingly, the third requirement for the applicability of Article 3 of the Statute is fulfilled.

222. With regard to the fourth *Tadić* condition, the Chamber reiterates the Appeals Chamber's statement that "a violation of [the rule prohibiting attacks on civilians] entails individual criminal responsibility".<sup>760</sup> In addition, the Chamber observes that at the material time there existed "Regulations concerning the Application of the International Law of War to the Armed Forces of SFRY", which provided for criminal responsibility for "war crimes or other serious violations of the law of war" and contained a list of laws binding upon the armed forces of the SFRY, including Additional Protocols I and II.<sup>761</sup>

(b) Attacks on civilian objects

223. The offence of attacking civilian objects is a breach of a rule of international humanitarian law. As already ruled by the Chamber in the present case and upheld by the Appeals Chamber, Article 52, referred to in respect of the count of attacking civilian objects, is a reaffirmation and reformulation of a rule that had previously attained the status of customary international law.<sup>762</sup>

224. The Chamber observes that the prohibition of attacks on civilian objects is set out only in Article 52 of Additional Protocol I, referred to in relation to Count 5. Additional Protocol II does not contain provisions on attacking civilian objects. Nonetheless, as the Appeals Chamber found, the rule prohibiting attacks on civilian objects has evolved to become applicable also to conflicts of an internal nature.<sup>763</sup> The Appeals Chamber noted that already during the Spanish Civil War the tendency to disregard the distinction between international and internal armed conflicts could be observed. Both the republican Government and third States insisted that certain rules applicable to

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<sup>758</sup> ICRC Commentary on Additional Protocols, p 586.

<sup>759</sup> "The civilian population as such, as well as individual civilians, shall not be the object of attack." (Article 51 (2) of Additional Protocol I).

<sup>760</sup> *Strugar* Appeals Chamber Decision on Jurisdiction, para 10.

<sup>761</sup> Exhibit P189, paras 9 and 20; "Regulations" contain provisions specifically prohibiting the making of civilians the direct object of combat operations (para 67) and making civilian facilities the object of attack or reprisals (para 73). See also the examples of provisions of domestic laws penalising the crimes of attacking civilians and civilian objects referred to in the *Kordić* Appeals Judgement, fn 73.

<sup>762</sup> *Strugar* Trial Chamber Decision on Jurisdiction, paras 17-21, and *Strugar* Appeals Chamber Decision on Jurisdiction, para 9; see also *Tadić* Jurisdiction Decision, para 127.

<sup>763</sup> *Tadić* Jurisdiction Decision, para 127.

international wars applied also to that war. Among those rules there was the prohibition of attacks on non-military objectives.<sup>764</sup> The Appeals Chamber further referred to the 1970 General Assembly resolution concerning the protection of civilians in “armed conflicts of all types”. In that resolution the General Assembly affirmed a number of basic principles, including the prohibition of making dwellings and other installations used only by civilian populations, as well as places and areas designated for the sole protection of civilians, the object of military operations.<sup>765</sup> The Chamber therefore concludes that despite the lack of a provision similar to Article 52 in Additional Protocol II, the general rule prohibiting attacks on civilian objects also applies to internal conflicts. Accordingly, the first and second jurisdictional requirements are met.

225. As regards the third *Tadić* condition, the Chamber notes that the prohibition of attacks on civilian objects is aimed at protecting those objects from the danger of being damaged during an attack. It further reiterates that a prohibition against attacking civilian objects is a necessary complement to the protection of civilian populations.<sup>766</sup> The Chamber observes that in the above-mentioned 1970 resolution of the General Assembly the prohibition of making civilian dwellings and installations the object of military operations was listed among the “basic principles for the protection of civilian populations in armed conflicts”. Those principles were reaffirmed because of the “need for measures to ensure the better protection of human rights in armed conflicts”. The General Assembly also emphasised that civilian populations were in “special need of increased protection in time of armed conflicts”.<sup>767</sup> The principle of distinction, which obliges the parties to the conflict to distinguish between civilian objects and military objectives, was considered “basic” by the drafters of Additional Protocol I.<sup>768</sup> The Chamber therefore finds that the prohibition at issue is a rule protecting important values. Similarly to what it has found in respect of the attacks on civilians, the Chamber considers that, in view of the fundamental nature of this prohibition, any attack against civilian objects, even if it did not cause any damage, can be considered a serious violation of international humanitarian law.<sup>769</sup> All the same, the Chamber recalls that the requirement of seriousness contains also the element of gravity of consequences for the victim. The Chamber is of the view that, unlike in the case of attacks on civilians, the offence at hand may not necessarily meet the threshold of “grave consequences” if no damage occurred. Therefore, the assessment of whether those consequences were grave enough to bring the offence into the scope of

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<sup>764</sup> *Tadić* Jurisdiction Decision, para 100.

<sup>765</sup> *Tadić* Jurisdiction Decision, para 111, referring to Resolution 2675 “Basic principles for the protection of civilian populations in armed conflicts”, adopted during the 25th Session of the General Assembly, on 9 December 1970, available from <http://www.un.org/documents/resga.htm>.

<sup>766</sup> *Strugar* Trial Chamber Decision on Jurisdiction, para 19.

<sup>767</sup> See *supra*, footnote 765.

<sup>768</sup> Article 48 of Additional Protocol I, entitled “Basic rule”, obliges the Parties to the conflict to distinguish at all times between civilian objects and military objectives. See also *Kordić* Appeals Judgement, para 54.

the Tribunal's jurisdiction under Article 3 of the Statute should be carried out on the basis of the facts of the case. The Chamber observes that in the present case it is alleged that the attacks against civilian objects, with which the Accused is charged, did incur damage to those objects.<sup>770</sup> It will thus pursue the examination of the case on the assumption that the attacks as charged in the Indictment did bring about grave consequences for their victims and the third *Tadić* condition is met. The Chamber would only need to return to the analysis of applicability of Article 3 of the Statute if the evidence on the alleged damage were to fail to demonstrate the validity of the Prosecution allegations to such an extent as to render it questionable whether the consequences of the attack were grave for its victims. As will be seen later in this decision, that is not the case.<sup>771</sup>

226. As recalled above, the fourth *Tadić* condition concerns individual criminal responsibility. The Appeals Chamber has found that under customary international law a violation of the rule prohibiting attacks on civilian objects entails individual criminal responsibility.<sup>772</sup> Furthermore, the Chamber recalls its above findings as to the SFRY regulations establishing criminal responsibility for violations of Additional Protocol I.<sup>773</sup>

### 3. Destruction and devastation of property, including cultural property

227. As to the first and the second *Tadić* conditions, the Chamber observes that Article 3(b) is based on Article 23 of the Hague Convention (IV) of 1907 and the annexed Regulations.<sup>774</sup> Both The Hague Convention (IV) of 1907 and The Hague Regulations are rules of international humanitarian law and they have become part of customary international law.<sup>775</sup>

228. Recognising that the Hague Regulations were made to apply only to international armed conflicts, the Chamber will now examine whether the prohibition contained in Article 3(b) of the Statute covers also non-international armed conflicts. The rule at issue is closely related to the one prohibiting attacks on civilian objects, even though certain elements of those two rules remain

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<sup>769</sup> This is to be distinguished, in the Chamber's view, from the issue whether damage is also an element of the crime of attacks on civilian objects. See *infra*, para 280.

<sup>770</sup> Indictment, paras 21 and 23.

<sup>771</sup> See *infra*, paras 320; 326-327.

<sup>772</sup> *Strugar* Appeals Chamber Decision on Jurisdiction, para 10.

<sup>773</sup> See *supra*, para 222.

<sup>774</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and the Regulations annexed thereto, 18 October 1907, Article 23: "In addition to the prohibition provided by special Conventions, it is specially forbidden [...] to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

<sup>775</sup> See paras 35 and 41 of the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993 (S/25704); *Blaškić* Trial Judgement, para 168. The International Court of Justice explicitly confirmed the customary law status of the Hague Regulations. It opined in its Advisory Opinion in 2004 that "The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court." The International Court of Justice, Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", No. 131, 9 July 2004, para 89.

distinct. Both rules serve the aim of protecting property from damage caused by military operations. In addition, the offence of devastation charged against the Accused is alleged to have occurred in the context of an attack against civilian objects.<sup>776</sup> Therefore, and having regard to its conclusion that the rule prohibiting attacks on civilian objects applies to non-international armed conflicts, the Chamber finds no reason to hold otherwise than that the prohibition contained in Article 3 (b) of the Statute applies also to non-international armed conflicts.<sup>777</sup>

229. Turning now to the crime charged under Article 3(d), the Chamber notes that this provision is based on Article 27 of the Hague Regulations.<sup>778</sup> Moreover, protection of cultural property had developed already in earlier codes.<sup>779</sup> The relevant provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954<sup>780</sup> confirm the earlier codes.<sup>781</sup> The Appeals Chamber in the *Tadić* case explicitly referred to Article 19 of the Hague

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<sup>776</sup> Indictment, paras 21 and 23.

<sup>777</sup> *Brdanin* Trial Judgement, para 592, fn 1505. See also *Hadžihasanović* 98bis Decision, paras 102 and 105. “The physical characteristics of exercises of violence and their effects upon people and resources are of course the same, assuming violence of comparable proportions, in an internal as in an international conflict. It would thus seem fairly obvious that (...) a fundamental policy of minimum unnecessary destruction is equally vital and applicable in one as in the other type of conflict”. Myres S McDougal and Siegfried Wiessner, *The International Law of War; Transnational coercion and world public order*, Dordrecht, Martinus Nijhoff Publishers, 1994, p 535.

<sup>778</sup> Article 27 of the Hague Regulations reads: “In sieges and bombardments *all necessary steps must be taken to spare, as far as possible*, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used *at the time for military purposes* [...]” (emphasis added).

<sup>779</sup> The first indications that the cultural property was to be protected came at the time of Renaissance. The Lieber Code in its Articles 35 and 36 provides for the protection of cultural property. The Brussels Declaration of 1874 in its Articles 16 and 17 states that in sieges and bombardments the officer in command of the attacking forces must take all necessary steps “to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes”, additionally to the provisions concerning protection of cultural property in occupied territories (Article 8). Although the Declaration was not ratified it had influenced the future codifications of laws and had widely been accepted as declaratory of customary international law leading to The Hague Convention Nos. IV and IX of 1907. The Oxford Manual of the Institute of International Law of 1880 should also be mentioned as it repeated almost word for word the relevant standards in this area laid down by the Brussels Declaration. Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May, 1954 in the Hague, and on other instruments of international law concerning such protection*. Dartmouth, UNESCO Publishing: 1996, pp 4-10.

<sup>780</sup> The Chamber is of the opinion that the institutions and objects falling under Article 3(d) of the Statute are included into the definition of the “cultural property” provided in Article 1 of this Convention:

“For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or Exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-para (a);

(c) centres containing a large amount of cultural property as defined in sub-paras (a) and (b), to be known as ‘centres containing monuments’.”

<sup>781</sup> The Chamber recalls that the development of the provisions of the Hague Convention of 1954 were “guided by the principles [...] established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935”, as it is stated in para 4 of its Preamble.

Convention of 1954,<sup>782</sup> as a treaty rule which formed part of customary international law binding on parties to non-international armed conflicts.<sup>783</sup> More generally, it found that the customary rules relating to the protection of cultural property had developed to govern internal strife.<sup>784</sup> The Chamber additionally notes that it is prohibited “to commit any act of hostility directed against [cultural property]” both in Article 53 of Additional Protocol I relating to international armed conflicts and Article 16 of Additional Protocol II governing non-international armed conflicts.<sup>785</sup>

230. In view of the foregoing, the Chamber is satisfied that Article 3(d) of the Statute is a rule of international humanitarian law which not only reflects customary international law but is applicable to both international and non-international armed conflicts. Accordingly, the first and second *Tadić* conditions with regard to Article s 3(b) and 3(d) are met.

231. As to the third *Tadić* condition, the Chamber recalls its conclusion that the offence of attacking civilian objects fulfils this condition when it results in damage severe enough to involve “grave consequences” for its victims.<sup>786</sup> It is of the view that, similarly to the attacks on civilian objects, the crime of devastation will fall within the scope of the Tribunal’s jurisdiction under Article 3 of the Statute if the damage to property is such as to “gravely” affect the victims of the crime. Noting that one of the requirements of the crime is that the damage be on a large scale, the Chamber has no doubt that the crime at hand is serious.

232. As regards the seriousness of the offence of damage to cultural property (Article 3 (d)), the Chamber observes that such property is, by definition, of “great importance to the cultural heritage of every people”.<sup>787</sup> It therefore considers that, even though the victim of the offence at issue is to be understood broadly as a “people”, rather than any particular individual, the offence can be said to involve grave consequences for the victim. In the *Jokić* case, for instance, the Trial Chamber noted

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<sup>782</sup> Article 19 para 1 of The Hague Convention of 1954 states:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

<sup>783</sup> *Tadić* Jurisdiction Decision, para 98; see a contrary view as to the customary nature of this principle in F Kalshoven, L Zegveld, *Constraints on the waging of war*, ICRC, Geneva 2001, p 48.

<sup>784</sup> *Tadić* Jurisdiction Decision, para 127. In *Brdanin* Trial Judgement, it was held that “[i]nstitutions dedicated to religion are protected [...] under customary international law,” para 595.

<sup>785</sup> It becomes apparent from the wording of both articles, which accord protection to cultural property “[w]ithout prejudice to the Provisions of the Hague Convention [of 1954]”, that Additional Protocols I and II did not intend “to revise the existing rules on the subject, but that protection and respect for cultural objects [was to be] confirmed”. ICRC Commentary on Additional Protocol I, para 2046, p 640. “In the draft the ICRC did not include a provision relating to the protection of cultural objects as this had been provided for by an international instrument especially designed for this purpose already in 1954. [...] However, the Diplomatic Conference considered that the Protocol should contain a provision of this type thereby revealing its concern for the cultural heritage of humanity.”, paras 2039 and 2040. Furthermore, in cases of contradiction, the primacy of the Hague Convention of 1954 over Article 53 of the Additional Protocol I was emphasized, para 2046.

<sup>786</sup> See *supra*, para 225.

<sup>787</sup> Article 1 (a) of The Hague Convention of 1954.

that the destruction and damage inflicted to the Old Town of Dubrovnik were very serious crimes. It found that “since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik].”<sup>788</sup> In view of the foregoing, the Chamber finds that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law. Hence, the third *Tadić* condition is satisfied.

233. As to the fourth *Tadić* condition, the Chamber notes that Article 6 of the Charter of the Nuremberg International Military Tribunal already provided for individual criminal responsibility for war crimes, including devastation not justified by military necessity, which is listed in Article 3(b) of the Statute. Concerning Article 3(d) of the Statute, the Chamber recalls that Article 28 of the Hague Convention of 1954 stipulates that “the high contracting parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention.” Furthermore, the case law of this Tribunal provides several examples of individuals convicted under Articles 3(b) or 3(d), or both, of the Statute.<sup>789</sup> Accordingly, the Chamber finds that Articles 3(b) and 3(d) of the Statute entail individual criminal responsibility. Thus, the fourth *Tadić* condition is fulfilled.

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<sup>788</sup> *Jokić* Sentencing Judgement, paras 45 and 53.

<sup>789</sup> *Blaškić* Trial Judgement, VI. Disposition; *Kordić* Trial Judgement, paras 834 and 836; *Naletilić* Trial Judgement, para 763; *Jokić* Sentencing Judgement, para 14; *Brđanin* Trial Judgement, paras 1082 and 1152.

## VI. THE CHARGES

### A. Crimes against persons (Count 1 and 2)

#### 1. Murder (Count 1)

234. The Indictment charges the Accused with criminal liability for murder as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Tonči Skočko and Pavo Urban.<sup>790</sup>

##### (a) Law

235. The elements of murder as a violation of the laws or customs of war under Article 3 of the Statute have been considered in many decisions of the Tribunal. The issue which has called for most consideration is the mental element, i.e. *mens rea*. It is now settled that the *mens rea* is not confined to cases where the accused has a direct intent to kill or to cause serious bodily harm, but also extends to cases where the accused has what is often referred to as an indirect intent. While the precise expression of the appropriate indirect intent has varied between decisions,<sup>791</sup> it has been confirmed by the Appeals Chamber that the awareness of a mere possibility that a crime will occur is not sufficient in the context of ordering under Article 7(1) of the Statute.<sup>792</sup> The knowledge of a higher degree of risk is required.<sup>793</sup> In some cases the description of an indirect intent as *dolus eventualis* may have obscured the issue as this could suggest that *dolus eventualis* as understood and applied in a particular legal system had been adopted as the standard in this Tribunal.

236. The following formulation appears to reflect the understanding which has gained general acceptance in the jurisprudence of the Tribunal: to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation it should be stressed that knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death. The Chamber notes that this formulation may prove to require amendment so that knowledge that death or serious bodily harm is a probable consequence is sufficient to establish the necessary *mens rea*, but the Chamber need not consider this in the present

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<sup>790</sup> Indictment, paras 16 and 18.

<sup>791</sup> *Delalić* Trial Judgement, para 439; *Blaškić* Trial Judgement, para 217; *Kordić* Trial Judgement, para 236; *Krstić* Trial Judgement, para 495.

<sup>792</sup> *Blaškić* Appeals Judgement, paras 41 and 42.

<sup>793</sup> *Blaškić* Appeals Judgement, paras 41 and 42.

case; it has not yet received authoritative acceptance. This definition would appear to be applicable also to wilful killing and murder under Articles 2 and 5, respectively.<sup>794</sup> In addition, to prove murder under Article 3 of the Statute, it must be shown that the victims were persons taking no active part in the hostilities.<sup>795</sup> The Chamber will proceed on this basis in the present case.

237. In this case the charges of murder arise out of an artillery attack on the Old Town of Dubrovnik on 6 December 1991. The deaths that are the subject of the murder charge are alleged to have resulted from that shelling by forces of the JNA under the command of the Accused. The Chamber refers to its analysis later in these reasons in relation to the charge of attacks on civilians in Count 3 in which the Chamber finds the shelling to be unlawful. This finding is equally applicable to Counts 1 and 2 and the Chamber will proceed on that basis.

238. A review of the Tribunal's case-law reveals that deaths resulting from shelling have formed the basis for charges of murder or wilful killing in at least two cases to date. In the *Galić* case, the Chamber by majority convicted the accused on Count 5 of the indictment for murder under Article 5 of the Statute for his participation in "a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and its civilian population."<sup>796</sup> While the *Galić* Chamber did not specify the particular facts which, in its opinion, fulfilled the intent requirement for murder in relation to this charge, a review of the specific shelling incidents upon which the conviction is based reveals that while the Chamber found that certain civilians were deliberately targeted,<sup>797</sup> it also made reference to incidents where civilian deaths resulted from an attack which was "indiscriminate as to its target (which nevertheless was primarily if not entirely a residential neighbourhood), and was carried out recklessly, resulting in civilian casualties".<sup>798</sup> The impression left is that both situations were taken to constitute murder, although there is no specific consideration of the issue.

239. In the *Kordić* case, wilful killings and murder were charged under Articles 2, 3 and 5 of the Statute, respectively for, *inter alia*, deaths that occurred as a result of attacks on various towns and villages in the area of central Bosnia. The specific facts upon which the Chamber relied in convicting the accused of murder and wilful killing are not clearly identified in the judgement. However, the majority of incidents analysed appear to be ones in which a civilian town or village was attacked with artillery before being overrun by HVO soldiers who then carried out individual killings. There is no specific attention to the issue. However civilian deaths resulting from both the

<sup>794</sup> See for example, *Stakić* Trial Judgement, para 584 (citing collected cases).

<sup>795</sup> See for example, *Galić* Trial Judgement, para 150 (in the context of the definition of murder under Article 5 of the Statute); see generally *Naletilić* Trial Judgement, para 248.

<sup>796</sup> *Prosecutor v. Galić*, Indictment, Counts 5 to 7.

<sup>797</sup> See for example, *Galić* Trial Judgement, paras 438-496 (incident at Markale market).

initial artillery attack and the subsequent targeted killings appear to have been considered as part of the factual matrix underlying the charges of murder and wilful killing.<sup>799</sup>

240. On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary *mens rea* for murder and wilful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result. The Chamber will proceed on this basis.

(b) Findings

241. The Prosecution submits that Tonči Skočko and Pavo Urban were killed in the Old Town as it was being shelled by the JNA on 6 December 1991.<sup>800</sup> In particular, the Prosecution submits that both victims died as a result of fatal shrapnel injuries caused by shell explosions in the Old Town.<sup>801</sup> It further submits that the evidence is capable of supporting a finding that Tonči Skočko and Pavo Urban were both civilians taking no active part in the hostilities at the time of their death.<sup>802</sup>

242. The Defence submits that Tonči Skočko and Pavo Urban did not die at the time and place and in the manner alleged in the Indictment.<sup>803</sup> The Defence further submits that the external examination of the bodies of Tonči Skočko and Pavo Urban carried out by the pathologist, Dr Ciganović, on 7 December 1991, was not executed in conformity with the requirements of the law then in force or the “rules of forensic medicine”.<sup>804</sup> It further submits that by virtue of the external examination carried out by Dr Ciganović, it is impossible to establish the precise time of death of Tonči Skočko and Pavo Urban.<sup>805</sup>

(i) Tonči Skočko

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<sup>798</sup> See for example, *Galić* Trial Judgement, paras 331-345.

<sup>799</sup> *Kordić* Trial Judgement, paras 720-722.

<sup>800</sup> Prosecution Final Brief, paras 152; 155 and 160.

<sup>801</sup> Prosecution Final Brief, paras 152; 155 and 160.

<sup>802</sup> Prosecution Final Brief, paras 156 and 160.

<sup>803</sup> Defence Final Brief, para 504.

<sup>804</sup> Defence Final Brief, paras 499-501.

<sup>805</sup> Defence Final Brief, para 503. The Defence also argues that at the time of death, both Tonči Skočko and Pavo Urban were not respecting the general alarm warning given to the citizens of Dubrovnik by the sirens at 0715 hours on 6 December 1991, thus contributing to the serious consequences that ensued: Defence Final Brief, para 509.

243. Early in the morning, on 6 December 1991, Nikola Jović was in his shop on Miha Pracata in the Old Town. Nikola Jović's friend Tonči Skočko, a young man of around 19 years, was also in the shop that morning. His father, Mato Skočko was the manager.<sup>806</sup> Nikola Jović described how, after the dust had settled from a shell landing directly outside the shop, he and Tonči Skočko left the shop and went out into the street.<sup>807</sup> It was around 0800 hours.<sup>808</sup> After barely a minute or two outside, there was "a huge flash followed by an explosion. There was dust, there was smoke, there were stones, there was rubble." The two young men immediately returned to the shop, where a few moments later, Tonči Skočko fell to the floor.<sup>809</sup> Efforts to resuscitate Tonči Skočko were in vain. After half an hour, Mato Skočko decided to take his son to hospital, despite the continuous shelling. When he returned some two hours later, he announced that Tonči Skočko was dead.<sup>810</sup>

244. With regard to the civilian status, both Ivo Vlašica and Nikola Jović gave evidence that Tonči Skočko was a young man working with his father in a shop located in the Old Town.<sup>811</sup> Ivo Vlašica gave evidence that around 0630 hours on 6 December 1991, he saw Tonči Skočko transporting food supplies in the Old Town.<sup>812</sup> Nikola Jović testified that at the time of death, Tonči Skočko was wearing civilian clothing, a jersey with long sleeves and pants.<sup>813</sup> On the basis of this evidence, the Chamber is satisfied that at the time of death Tonči Skočko was a civilian, taking no active part in the hostilities.

245. As to the cause of death, Dr Ciganović who carried out an external examination of Tonči Skočko's body on 7 December 1991, the results of which were compiled in a report, recorded that Tonči Skočko's right lung had been torn by a fragment of an explosive device.<sup>814</sup> Dr Ciganović stated that "the injury bore all the characteristics of an injury that had been caused by an explosive device". Dr Ciganović, on the basis of his examination, concluded that the cause of death was haemorrhage.<sup>815</sup>

246. Dr Šoć, a pathologist called by the Defence, reviewed Dr Ciganović's report on the examination of Tonči Skočko's body. During his testimony and in a report, Dr Šoć disputed the adequacy of the external examination of Tonči Skočko's body carried out by Dr Ciganović.<sup>816</sup> According to Dr Šoć, the external examination carried out by Dr Ciganović cannot give complete

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<sup>806</sup> Nikola Jović, T 2933.

<sup>807</sup> Nikola Jović, T 2941-2942.

<sup>808</sup> Nikola Jović, T 2336-2338.

<sup>809</sup> Nikola Jović, T 2941-2942.

<sup>810</sup> Nikola Jović, T 2943-2944.

<sup>811</sup> Ivo Vlašica, T 3321-3322; Nikola Jović, T 3024-3025; T 2933.

<sup>812</sup> Ivo Vlašica, T 3356.

<sup>813</sup> Nikola Jović, T 3025-3026.

<sup>814</sup> Dr Ciganović, T 2839; Exhibit P70.

<sup>815</sup> Dr Ciganović, T 2839.

and correct results on the cause of death of the deceased but can only yield answers as to the mechanism of death.<sup>817</sup> On the contrary, in Dr Ciganović's report, the cause of death (*i.e.* in the present case, "haemorrhage") was reported. However, during his testimony, Dr Šoć confirmed that "lives can be lost when a person is hit by shrapnel from as far away as 40 metres from where the person is actually standing."<sup>818</sup>

247. Dr Šoć also argued that Dr Ciganović's report was not compiled in conformity with the rules of forensic medicine. According to these forensic rules he contended, in a report, among other things, all wounds must be described, the exact amount of fluid must be measured, and consistency and colour of the blood must be recorded.<sup>819</sup> Dr Ciganović on the other hand did not use the required parameters in his report and made liberal remarks, such as, "there is a lot of blood".<sup>820</sup>

248. All of the formal legal requirements of the SFRY for post mortem examinations may not have been observed by Dr Ciganović. While a relevant consideration, in the circumstances of this case and in light of the direct evidence of wounding and its apparent effects, that does not persuade the Chamber that the findings of Dr Ciganović should be disregarded. The factual issue for the Chamber is whether the death of Tonči Skočko was caused by a JNA shell. The Chamber has received, and accepts, evidence of the physical circumstances in which Tonči Skočko was suddenly injured at the time of the explosion of a shell during the bombardment of the Old Town by JNA forces. Tonči Skočko died a relatively short time thereafter. A skilled and experienced pathologist, Dr Ciganović examined the body of Tonči Skočko, discovered that a fragment of shrapnel had torn his right lung from which death resulted. In the experienced opinion of Dr Ciganović the injury bore all the characteristics of an injury caused by an explosive device. Both the requirements of the laws of the SFRY dealing with post mortem examinations and the normal principles to be applied in forensic examinations are designed to cover all possible situations. In this case the circumstances are particular and limited. There was an explosion of a military shell in the vicinity of Tonči Skočko. He was obviously wounded when this occurred. Not long after he died. Examination revealed a shrapnel wound characteristic of such an explosion which caused injuries which would normally cause death if intervention could not prevent death. Given these circumstances the Chamber is entirely satisfied that the fact of death and the cause of death are established. In the Chamber's finding, Tonči Skočko died from haemorrhaging caused by shrapnel wound from a shell explosion in the course of the JNA artillery attack on the Old Town on 6 December 1991.

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<sup>816</sup> Dr Šoć, T 7931-8012; Exhibit D124.

<sup>817</sup> Dr Šoć, T 7935-7937.

<sup>818</sup> Dr Šoć, T 7977.

<sup>819</sup> Dr Šoć, T 7933-7935.

<sup>820</sup> Dr Šoć, T 7939-7941.

249. With respect to the *mens rea* required for murder, the Chamber reiterates its findings that the JNA attack on the Old Town was deliberate<sup>821</sup> and that the perpetrators knew it to be populated. The Chamber finds that the perpetrators of the attack can only have acted in the knowledge that the death of one or more of the civilian population of the Old Town was a probable consequence of the attack.

250. On the basis of the foregoing, and leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Tonči Skočko.

(ii) Pavo Urban

251. On 6 December 1991, Witness A was in his apartment in the Old Town, sheltering during the JNA shelling of the Old Town. Witness A knew Pavo Urban, a professional photographer, who photographed damage in the Old Town. On that day at around 1400 hours, Witness A heard the voices of Pavo Urban's colleagues who were standing in Uska Street to the west of his building. They sounded panic-stricken. They were saying that Pavo Urban had been hit. At that moment, Witness A ran to the window and saw a motionless body lying on the ground below the city bell tower,<sup>822</sup> on the southern side of the Sponza Palace.<sup>823</sup> While Witness A could not recognise Pavo Urban at that distance, in court he was able to identify Pavo Urban in a photograph taken of the body lying in the same location where Witness A had seen it that day.<sup>824</sup> Witness A watched from the window as an ambulance passed by his window. The next time he went to look, the body was gone.<sup>825</sup>

252. With regard to the civilian status of Pavo Urban, a number of witnesses confirmed that Pavo Urban was a photographer documenting the damage to buildings in the Old Town.<sup>826</sup> In the photograph taken of Pavo Urban's body, he appears wearing civilian clothing.<sup>827</sup> There is no evidence which persuades the Chamber that Pavo Urban was engaged in any military activities. The

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<sup>821</sup> See *supra*, para 214.

<sup>822</sup> Witness A, T 3628-3629. In court Witness A identified the location of Pavo Urban's body in a video clip on Dubrovnik. According to Witness A the body laid under the archway on the left hand side of the city bell tower: Exhibit P97; T 3635.

<sup>823</sup> Witness A marked on a map of the Old Town and on an aerial photograph of the Old Town: (a) the location of Pavo Urban's body; and (b) the location of Witness A's apartment: Exhibits P95 and P96; T 3624, T 3631-3632. Witness Ivan Mustac gave evidence that he saw Pavo Urban on the south side of Sponza Palace at around 1100 hours on 6 December 1991: Ivan Mustac, T 1470-1472.

<sup>824</sup> Witness A, T 3629-3630 and Exhibit P94 (photograph of Pavo Urban).

<sup>825</sup> Witness A, T 3630-3631.

<sup>826</sup> Witness A, T 3628; Slavko Grubišić, T 1046-1047; Mato Valjalo, T 2003.

<sup>827</sup> Exhibit P94. According to Witness A, in the photograph, Pavo Urban is wearing blue trousers (jeans) and a red vest; his camera is in his left arm: Witness A, T 3629-3630.

Chamber is satisfied that, at the time of death, Pavo Urban was a civilian, taking no active part in the hostilities.

253. With regard to the cause of death, Dr Ciganović carried out an external examination of Pavo Urban's body on 7 December 1991. The results of this examination were compiled in a report. They recorded that Pavo Urban had one injury in the navel area, a wound caused by an explosive device.<sup>828</sup> Dr Ciganović described in detail the characteristic features of such a wound:

First of all, an irregular and, as a rule, large entry opening with an irregular wound on the skin with features contused and torn edges. And this contused edge of the wound, which is caused by the entry of a projectile into the body, if the wound was inflicted by a nearby explosion, at close range that is, there is also a sign of burning on the edges and around the edges of the wound; while inside the wound – at the entry and inside the wound there is also a trace of the passage of the projectile which is caused by the dust and the specks from the surface of the projectile.<sup>829</sup>

Based on his examinations, Dr Ciganović concluded that it was an explosive device that had caused the injury and that haemorrhage was the cause of death.<sup>830</sup>

254. Dr Šoć, a pathologist called by the Defence reviewed Dr Ciganović's report on the external examination of Pavo Urban's body. As said above, throughout his testimony and in a report, Dr Šoć disputed the adequacy of the type of examination carried out by Dr Ciganović on 7 December 1991.<sup>831</sup> Dr Šoć argued that the cause of death of Pavo Urban could not be determined by an external examination of the body. In the case of Pavo Urban, Dr Šoć also stressed that Dr Ciganović, did not indicate the cause of Pavo Urban's death.<sup>832</sup>

255. The Chamber finds that Dr Šoć's criticism of the external examination carried out by Dr Ciganović on Pavo Urban may have some formal or technical force, but in the circumstances of the case and in light of Witness A's evidence, it does not give rise to a doubt as to the cause of his death, namely haemorrhage caused by shrapnel from a shell explosion. On the basis of this evidence, the Chamber is satisfied that Pavo Urban was killed in the course of the attack on the Old Town on 6 December 1991.

256. The observations of the Chamber with respect to Dr Šoć's criticism of the examination of the body of Tonči Skočko, and of the validity of Dr Ciganović's resulting findings, may be repeated in substance with respect to the examination and findings of Dr Ciganović as to the cause of death

<sup>828</sup> "... one injury in the navel area, an explosive wound on the surface of the skin which was several centimetres in diameter, 5 or 6 centimetres, I believe it was, through which one could see the damaged intestines and other abdominal organs, the profuse bleeding inside the abdominal cavity, as well as the signs of blood flowing from the wound across the surrounding skin. Inside the abdomen I found a fragment of the explosive device that had caused the damage and haemorrhage was the cause of death": Dr Ciganović, T 2746-2747. *See also Exhibit P70.*

<sup>829</sup> Dr Ciganović, T 2747-2748.

<sup>830</sup> Dr Ciganović, T 2747.

<sup>831</sup> Dr Šoć, T 7931-8012; Exhibit D124. *See supra*, paras 246-247.

of Pavo Urban. The evidence established, in the Chamber's finding, the circumstances in which Pavo Urban was wounded by the explosion of a shell during a JNA artillery barrage. Expert examination revealed that death was due to wounding entirely consistent with such an explosion. The Chamber is entirely satisfied and finds that the fact and cause of death of Pavo Urban are established. The death was caused by haemorrhage due to a shrapnel wound from a JNA shell explosion.

257. It should be observed that Dr Ciganović's examination of Pavo Urban's body, and that of Tonči Skočko, were conducted under remarkable circumstances which explain entirely, in the Chamber's view, his non-observance of more normal procedures. He had to examine the bodies of 19 deceased people on 7 December 1991. There was no power for refrigeration or lighting and there was no running water. Despite these restraints, in the Chamber's finding, he was able to draw on his clear expertise to reach entirely satisfactory and persuasive findings which the Chamber accepts.

258. With respect to the *mens rea* required for murder, the Chamber repeats its finding and reasoning in respect of Tonči Skočko.<sup>833</sup>

259. On the basis of the foregoing, leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Pavo Urban.

## 2. Cruel treatment (Count 2)

260. The Indictment charges the Accused with criminal liability for cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Mato Valjalo and Ivo Vlašica.<sup>834</sup> Similar allegations relating to Nikola Jović, also listed in the Indictment as a victim of cruel treatment, were dismissed in the Chamber's Decision on Rule 98bis.<sup>835</sup>

### (a) Law

261. The crime of cruel treatment as a violation of the laws or customs of war pursuant to Article 3 of the Statute, is defined in the jurisprudence of the Tribunal as an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on

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<sup>832</sup> Dr Šoć, T 7984-7986.

<sup>833</sup> See *supra*, para 249.

<sup>834</sup> Indictment, paras 16 and 18.

<sup>835</sup> The Chamber found there that the evidence relating to Nikola Jović's injuries and mental anguish was "not capable of establishing the element of *serious* mental or physical suffering or injury for the crime of cruel treatment", Rule 98bis Decision, para 46.

human dignity.<sup>836</sup> As regards the *mens rea* for the crime of cruel treatment, the Chamber sees no reason to depart from the reasoning expounded above in relation to the crime of murder. Accordingly, the Chamber holds that indirect intent, *i.e.* knowledge that cruel treatment was a probable consequence of the perpetrator's act or omission, may also fulfil the intent requirement for this crime. In addition, in order to prove cruel treatment under Article 3 of the Statute, it must be shown that the victims were persons taking no active part in the hostilities.<sup>837</sup>

(b) Findings

262. The Prosecution submits that Mato Valjalo and Ivo Vlašica were injured in the Old Town as it was being shelled on 6 December 1991.<sup>838</sup> It further submits that they were both civilians taking no active part in the hostilities<sup>839</sup> and that their injuries required extensive treatment and left them both with disabilities.<sup>840</sup>

263. Regarding Ivo Vlašica, the Defence submits that his testimony presents so many inconsistencies, relating to both his identity and his actual injuries, that it cannot be accepted.<sup>841</sup> With respect to Mato Valjalo, the Defence submits that he was not a civilian at the time he was wounded as he was on wartime duty, driving persons who were actively involved in the hostilities.<sup>842</sup> It further states that his medical records are inconsistent in their diagnosis and description of the shrapnel wounds.<sup>843</sup>

(i) Ivo Vlašica

264. Ivo Vlašica testified that he had a store in the Old Town, located in the Od Puca street, which he had opened on the morning of 6 December.<sup>844</sup> Thinking he heard a delivery truck in the street outside, he stepped out of his shop to look. At that moment he felt the detonation of a shell and realised that he had been wounded in his leg.<sup>845</sup> He stepped back into the store and fell to the ground. Kate Burić, one of his employees, attempted to stem the profuse bleeding from the wound. Concerned about the well being of Ivo Vlašica, Kate Burić finally succeeded in contacting a doctor.<sup>846</sup> However, due to the intensity of the shelling in the Old Town, no ambulance was able to

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<sup>836</sup> Čelebić Appeals Judgement, para 424; Vasiljević Trial Judgement, para 234; Naletilić Trial Judgement, para 246.

<sup>837</sup> Čelebić Appeals Judgement, para 424.

<sup>838</sup> Prosecution Final Brief, paras 167 and 173.

<sup>839</sup> Prosecution Final Brief, paras 169-172; 174.

<sup>840</sup> Prosecution Final Brief, paras 168-169; 173-174.

<sup>841</sup> Defence Final Brief, paras 494-497.

<sup>842</sup> Defence Final Brief, para 491.

<sup>843</sup> Defence Final Brief, para 492.

<sup>844</sup> Ivo Vlašica, T 3309-3310; 3321.

<sup>845</sup> Ivo Vlašica, T 3321-3322.

<sup>846</sup> Ivo Vlašica, T 3322.

attend the incident for the next two hours.<sup>847</sup> Kate Burić was instructed to try and bandage the wound, which she did, using a shirt and some cotton pads from the store. She was told by the doctor to keep Ivo Vlašica awake at all costs, or he might die. Ivo Vlašica remained for over two hours in this highly precarious situation, during which time there was almost continuous shelling, before another of his employees risked driving his car through the Old Town to pick him up and take him to hospital for treatment.<sup>848</sup> He remained in hospital for two weeks<sup>849</sup> and his leg is now 30 per cent disabled as a result of muscle deformation.<sup>850</sup> Thirteen years later, he stated, he stills feels some pain in his leg.<sup>851</sup>

265. In support of Ivo Vlašica's evidence, the Prosecution has submitted hospital records indicating that he received medical treatment, including surgery, from 6 to 21 December 1991 after having been diagnosed with shrapnel in his leg.<sup>852</sup>

266. The Defence submits, however, that these medical records present inconsistencies as to Ivo Vlašica's date of birth and as to which of his legs was injured. The Chamber first notes that the reports are all consistent in stating that Ivo Vlašica was born in 1957 with the single exception of the specialist's report dated 6 December 1991, in which Ivo Vlašica's recorded date of birth is 1987.<sup>853</sup> The Chamber has no difficulty accepting that this is merely a mistake in the translation of the document. The original document is handwritten and the year indicated therein could well be read as either 1957 or 1987. The Chamber therefore finds that this inconsistency is of no significance.

267. With regard to the issue of which leg was injured,<sup>854</sup> Ivo Vlašica testified that he was injured on his right leg, approximately 15 cm below the hip and 20 cm above the knee.<sup>855</sup> The Chamber notes that this evidence is consistent with several medical records, namely the specialist's report,<sup>856</sup> the report of the x-ray department<sup>857</sup> and the anaesthesia chart,<sup>858</sup> all dated 6 December 1991. The Chamber also refers to the official records of the Croatian government relating to

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<sup>847</sup> Ivo Vlašica, T 3322-3325.

<sup>848</sup> Ivo Vlašica, T 3323-3325.

<sup>849</sup> Ivo Vlašica, T 3333-3335.

<sup>850</sup> Ivo Vlašica, T 3357-3359. *See also*, Exhibits P86.1; P86.2 and P86.3.

<sup>851</sup> Ivo Vlašica, T 3335.

<sup>852</sup> Exhibit P211.

<sup>853</sup> Exhibit P211, document C.

<sup>854</sup> In this respect, the Chamber notes that in his expert report, Miodrag Šoć states that "it is not possible to ascertain definitely what leg- thigh was in question-left or right", Exhibit D124, Ad. 3.

<sup>855</sup> Ivo Vlašica, T 3327-3328.

<sup>856</sup> Exhibit P211, document C.

<sup>857</sup> Exhibit P211, document D.

<sup>858</sup> Exhibit P211, document E.

Ivo Vlašica's injury to the right leg.<sup>859</sup> In contradiction with this evidence is what appears to be the entry for Ivo Vlašica in the hospital's registration log<sup>860</sup> as well as a joint statement of the head of the ward, Dr Jakša Šegedin, and the head of the hospital, Dr Ljiljana Betica-Rodić, dated 18 February 2004.<sup>861</sup> Both these documents tend to suggest that Ivo Vlašica was injured in his left leg. In spite of these inconsistencies, the Chamber accepts Ivo Vlašica's testimony and the reports of the medical practitioners who directly examined him at the time, namely the specialist, the radiographer and the anaesthetist. The reference to the left leg is in an administrative record and in a 2004 report which, no doubt, reflected the administrative record and was not based on a medical examination.<sup>862</sup> The Chamber is therefore satisfied that Ivo Vlašica was injured to the right leg as he says.

268. There is no real dispute in the evidence that Ivo Vlašica was taking no active part in the hostilities<sup>863</sup> and that his injuries were directly caused by the JNA shelling of the Old Town on 6 December 1991.<sup>864</sup>

269. With respect to the *mens rea* required for cruel treatment, the Chamber refers to its previous findings in relation to the murder charge. With appropriate amendment of death to cruel treatment, that reasoning and the finding is equally applicable to Count 2.

270. On the basis of the foregoing, and leaving aside the question of the Accused's criminal responsibility, the Chamber finds that the elements of the crime of cruel treatment have been made out in relation to Ivo Vlašica.

(ii) Mato Valjalo

271. Mato Valjalo, who had seen the shells falling on Mount Srd early in the morning of 6 December from his apartment in the Old Town, later set off for work down the Stradun. After hearing some "terrible shooting", he started to run. At that moment a shell detonated about 40 to 50 metres behind him.<sup>865</sup> He felt a terrible pain in his head and his legs and when he put his hand to

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<sup>859</sup> Exhibit P86.1 is an official decision of the Dubrovnik Office for Work, Health and Social Welfare dated 10 June 1996, recognising Ivo Vlašica as a "civilian war invalid" entitled to "disability benefit" on account of "the wounding of his right upper leg", an injury incurred when he was "wounded by shrapnel on 6 December 1991". Exhibit P86.2 is the document from the First Instance Medical Committee for the medical examination of the person covered by the Law on the Protection of Military and Civilian War Invalids dated 23 April 1996 and confirms that Ivo Vlašica is entitled to recognition of his invalidity on account of "the wounding of the right upper leg". Exhibit P86.3 is apparently a substantially illegible handwritten version of Exhibit P86.2.

<sup>860</sup> Exhibit P211, document A.

<sup>861</sup> Exhibit P84.

<sup>862</sup> The Chamber recalls that in cross-examination, Miodrag Šoć acknowledged that if there was going to be an inaccuracy in the medical reports, it would be more likely be made by an administrative clerk than by a surgeon, T 7992-7994. He added that he would have to trust the surgeon and assume that there had been a mistake in the record entries, T 8010-8011.

<sup>863</sup> Ivo Vlašica testified that he was working in his father's grocery store, T 3321-3322.

<sup>864</sup> Ivo Vlašica, T 3321-3322; *see also*, Exhibit P211.

<sup>865</sup> Mato Valjalo, T 2000-2001.

his leg and his neck he discovered he was bleeding.<sup>866</sup> He managed to run towards the central café in town where he sought shelter and received some rudimentary assistance with his wounds.<sup>867</sup> The emergency services were alerted to his injuries, but due to the shelling, the ambulance was not able to attend.<sup>868</sup> He was eventually taken to a hospital in Lapad by two men in camouflage uniform who were collecting the dead and wounded.<sup>869</sup> He was found to have shrapnel lodged in his leg, head and lungs.<sup>870</sup> At the hospital, the doctors managed to extract some of the shrapnel from his leg.<sup>871</sup>

272. He was initially treated in the Dubrovnik Medical Centre from 6 to 12 December 1991 for several blast wounds, including a 4cm wound in the neck region.<sup>872</sup> Following this, he was transferred for further treatment in a Surgery Clinic in Rijeka, where he remained until 9 January 1992,<sup>873</sup> before undertaking rehabilitation in Opatija until 26 February 1992.<sup>874</sup> Official and medical records also indicate that as a result of his injuries, Mato Valjalo is 30 per cent disabled<sup>875</sup> and suffers from psychoneurosis. It is noted that he is also affected by degenerative rheumatism.<sup>876</sup>

273. Dr Miodrag Šoć testified that the medical records were inconsistent as to the amount or location of the shrapnel in Mato Valjalo's body.<sup>877</sup> However, hospital records confirm Mato Valjalo's evidence that, on 6 December 1991, he was wounded by an explosive device in the neck, thorax and right leg.<sup>878</sup> On the basis of this evidence, the Chamber is satisfied that Mato Valjalo

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<sup>866</sup> Mato Valjalo, T 2001-2002.

<sup>867</sup> Mato Valjalo, T 2002.

<sup>868</sup> Mato Valjalo, T 2002.

<sup>869</sup> Mato Valjalo, T 2002-2003.

<sup>870</sup> Mato Valjalo, T 2004-2006. One of the pieces of shrapnel in Mato Valjalo's lungs was discovered later, when he went for a check-up in Zagreb, T 2005-2006.

<sup>871</sup> Mato Valjalo, T 2004-2005.

<sup>872</sup> Exhibit P57.

<sup>873</sup> Mato Valjalo, T 2004-2005; Exhibit P56.

<sup>874</sup> Mato Valjalo, T 2009; Exhibit P56.

<sup>875</sup> Exhibit P60 is an official decision of the Dubrovnik Secretariat for Health, Social Welfare, Labour, Soldiers and Disability Affaires dated 15 December 1993, recognising Mato Valjalo as a "disabled veteran" entitled to "disability allowance" on account of serious injuries sustained on 6 December 1991 on Stradun.

<sup>876</sup> Exhibits P56 and P58.

<sup>877</sup> Miodrag Šoć, T 7954-7955; *see also* D124, Ad. 2. With regard to the injury in the lung, Miodrag Šoć admitted during cross-examination that he had overlooked the reference thereto in Exhibit P56, T 7994-7998.

<sup>878</sup> Exhibit P58, a handwritten letter from the Dubrovnik Medical Centre states that Mato Valjalo was "[w]ounded by an explosive device on 6 December 1991 in the head and neck, right hemithorax, right thigh and lower leg". Exhibit P57, a letter of discharge from the Dubrovnik Medical Centre dated 12 December 1991, indicates that Mato Valjalo "was wounded on 6 December 1991. He sustained several blast wounds. The biggest ones were to the neck, 4cm, and also entry-and-exit wounds to the medial side of the right thigh". Exhibit P56, a release form from the Clinical Hospital in Rijeka dated 9 January 1992, and which Miodrag Šoć described as the most comprehensive medical file, states that "[d]uring an explosion in Dubrovnik, the patient was inflicted several wounds on the nuchal region, thorax, right upper leg and lower leg", Miodrag Šoć, T 7954-7955. According to Exhibit P59, a case history of the Dubrovnik Medical Centre dated 13 March 1995, Mato Valjalo, "[w]ounded by shell on 6 December 1991, received many injuries to the head, chest and legs. He still has foreign bodies (shrapnel) in the right leg, lungs and neck."

sustained serious injury in the course of the JNA artillery attack on the Old Town on 6 December 1991.

274. With regard to the issue of Mato Valjalo's civilian status, the evidence indicates that he was a driver for the Dubrovnik Municipal Crisis Staff.<sup>879</sup> Mato Valjalo testified that in this capacity, he was driving officials who came to Dubrovnik to various places, including the Old Town.<sup>880</sup> On 6 December 19791, Mato Valjalo was injured on the Stradun while he was on his way to work.<sup>881</sup> The Chamber finds that there is nothing in the evidence to suggest that, as a driver, in this capacity, he was taking an active part in the hostilities.

275. With regard to the required *mens rea*, the Chamber repeats its finding made in respect of Ivo Vlašića.<sup>882</sup>

276. On the basis of the foregoing, and leaving aside the question of the Accused's criminal responsibility, the Chamber finds that the elements of the crime of cruel treatment have been made out in relation to Mato Valjalo.

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<sup>879</sup> Mato Valjalo testified that he was the driver of the President of the Crisis Staff, Mr Zeljko Sikić, T 1995-1997. See also Exhibit P60, according to which Mato Valjalo sustained his injuries "while performing his duty as a Dubrovnik Municipal Crisis Staff driver".

<sup>880</sup> Mato Valjalo, T 1995-1997.

<sup>881</sup> Mato Valjalo, T 2000-2002.

<sup>882</sup> See *supra*, para 269.

## **B. Attacks on civilians and civilian objects (Counts 3 and 5)**

### **1. Law**

277. The Accused is charged, under Count 3 of the Indictment, with attacks on civilians, a violation of the laws or customs of war, as recognised by Article 51 of Additional Protocol I<sup>883</sup> and Article 13 of Additional Protocol II<sup>884</sup> to the Geneva Conventions of 1949. The Accused is charged under Count 5 with unlawful attacks on civilian objects, in breach of the laws and customs of war, as recognized by Article 52 of Additional Protocol I<sup>885</sup> to the Geneva Conventions, and customary law.

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<sup>883</sup> Article 51 of Additional Protocol I provides, in so far as relevant:

“1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. ...

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective;

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated [...]

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.”

<sup>884</sup> Article 13 of Additional Protocol II in its relevant part reads:

“1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”

<sup>885</sup> Article 52 of Additional Protocol I provides:

“1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”

278. The Prosecution refers to the definition of the crime of attacks on civilians given in the *Galić* Trial Judgement.<sup>886</sup> It reiterates the elements of the offence of attacking civilian objects established by the *Blaškić* and *Kordić* Trial Chambers, noting that the *Blaškić* Appeals Chamber overturned the Trial Chamber's finding as to the "military necessity" exception.<sup>887</sup> The Prosecution further submits that indiscriminate attacks and disproportionate attacks may be regarded as direct attacks on civilian objects.<sup>888</sup> The Defence gives the following examples of military objectives: buildings and objects that provide administrative and logistical support for military operations, as well as examples of objects that in certain circumstances may constitute military objectives: transportation systems for military supplies and a transportation centre where lines of communication converge.<sup>889</sup> The Defence refers to the comment by the ICRC, according to which in the majority of cases military commanders will not themselves have the opportunity to check the accuracy of information provided to them by the competent services of the military as to the military nature of an objective.<sup>890</sup> The Defence further submits that commanders will not be held to a standard of perfection in reaching their decisions.<sup>891</sup>

279. In the Chamber's view, the facts established in this case make it unnecessary to consider many of the legal and factual issues raised by the submissions of the parties. We would however make the following general observations. The Indictment in this case is confined to an artillery attack on the Old Town which occurred on 6 December 1991. There was also shelling of the wider city of Dubrovnik on that day. The Old Town is a physically distinct part of the wider city. Its geographical location in the wider city, and its clearly visible boundaries as marked by the medieval walls that surround the Old Town, provide an immediate and obvious demarcation of the Old Town from the rest of the city. It is a demarcation which is plain to see at a distance<sup>892</sup> and was obvious to the JNA forces on 6 December 1991. The Old Town is also legally distinct from the rest of the wider city because the Old Town, in its entirety including the medieval walls, enjoys a World Heritage listing and the protections and immunities that are consequent on that listing. In the context of this particular case there is a further basis for distinguishing the Old Town from the remainder of the wider city of Dubrovnik. As found by the Chamber in this decision, on 6 December 1991 there were a few Croatian military positions in the wider city of Dubrovnik that were relevant to the JNA attempt to capture Srd that day, whereas there were none in the Old Town,

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<sup>886</sup> Prosecution Final Brief, para 213.

<sup>887</sup> Prosecution Final Brief, para 179 as amended by "Corrigenda to "Prosecution Final Trial Brief", para 3.

<sup>888</sup> Prosecution Final Brief, para 218.

<sup>889</sup> Defence Final Brief, para 563.

<sup>890</sup> Defence Final Brief, para 565.

<sup>891</sup> Defence Final Brief, para 570.

<sup>892</sup> Exhibit C1/2.

and it was not believed by the JNA forces responsible for the shelling that there were.<sup>893</sup> For all of these quite compelling reasons it is legally and factually appropriate, in the circumstances of this case, to consider the targeting and shelling of the Old Town in isolation, and in distinction from, the targeting and shelling of the remainder of the wider city of Dubrovnik. That is so for all counts.

280. The offence of attacks on civilians and civilian objects was defined in earlier jurisprudence as an attack that caused deaths and/or serious bodily injury within the civilian population or damage to civilian objects, and that was “conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity”.<sup>894</sup> The Appeals Chamber recently clarified some of the jurisprudence relating to the various elements of the crime. First, the Appeals Chamber rejected any exemption on the grounds of military necessity and underscored that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law.<sup>895</sup> In this respect, the Chamber would observe that on the established facts in the present case, there was no possible military necessity for the attack on the Old Town on 6 December 1991.<sup>896</sup> Further, the Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects.<sup>897</sup> With respect to the scale of the damage required, the Appeals Chamber, while not discussing the issue in detail, appeared to endorse previous jurisprudence that damage to civilian objects be extensive.<sup>898</sup> In the present case however, in light of the extensiveness of the damage found to have been caused, the Chamber finds no need to elaborate further on the issue and will proceed on the basis that if extensive damage is required, it has been established in fact in this case.<sup>899</sup>

281. In the present case, the Chamber notes that the Accused is charged, alternatively, with attacks which, although directed against military objectives, should have been expected to cause incidental loss of civilian life, injury to civilians or damage to civilian property, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>900</sup> However, as shown elsewhere in this decision, the issue whether the attack charged against the Accused was

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<sup>893</sup> See *supra*, paras 193-194; 211.

<sup>894</sup> *Blaškić* Trial Judgement, para 180; *Kordić* Trial Judgement, para 328. The Chamber notes that the definition in the *Kordić* Trial Judgement further required that damage to civilian objects be extensive, while such requirement was not set out in the *Blaškić* Trial Judgement.

<sup>895</sup> *Blaškić* Appeals Judgement, para 109; *Galić* Trial Judgement, para 44; *Kordić* Appeals Judgement, para 54, as revised by a “Corrigendum” of 26 January 2005.

<sup>896</sup> See *supra*, paras 193-194; 214; see also *infra*, para 288.

<sup>897</sup> *Kordić* Appeals Judgement, para 67. The conclusion was based, *inter alia*, on the state practice concerning the matter at the time when the attacks occurred in the *Kordić* case, para 66. There is nothing to suggest that the state practice was different in this connection at the time relevant to the Indictment in the present case.

<sup>898</sup> *Kordić* Appeals Judgement, paras 40-68.

<sup>899</sup> See *infra*, para 326.

<sup>900</sup> Prosecution Final Brief, paras 247-248, 255 and 263.

directed at military objectives and only incidentally caused damage does not arise in the present case.<sup>901</sup> Therefore, the Chamber does not find it necessary to determine whether attacks incidentally causing excessive damage qualify as attacks directed against civilians or civilian objects.<sup>902</sup>

282. Pursuant to Article 49(1) of Additional Protocol I to the Geneva Conventions “attacks” are acts of violence against the adversary, whether in offence or in defence. According to the ICRC Commentary an attack is understood as a “combat action” and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict.<sup>903</sup> As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.<sup>904</sup> The presence of certain non-civilians among the targeted population does not change the character of that population. It must be of a “predominantly civilian nature”.<sup>905</sup> Further, Article 50 (1) of Additional Protocol I provides for the assumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.<sup>906</sup> The Chamber reiterates that “civilian property covers any property that could not be legitimately considered a military objective”.<sup>907</sup>

283. The Chamber therefore concludes that the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack. For reasons stated above,<sup>908</sup> the issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.

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<sup>901</sup> See *supra*, para 214.

<sup>902</sup> It was the view of the *Galić* Trial Chamber that even though the main object of such excessively disproportionate attacks is not a civilian population or individual civilians, they could also qualify as direct attacks against civilians. See *Galić* Trial Judgement, para 57.

<sup>903</sup> ICRC Commentary on the Additional Protocols, p 603. See also *Kordić* Appeals Judgement, para 47.

<sup>904</sup> *Akayesu* Trial Judgement, para 582; *Blaškić* Trial Judgement, para 214.

<sup>905</sup> *Tadić* Trial Judgement, para 638; *Blaškić* Trial Judgement, para 214.

<sup>906</sup> *Kordić* Appeals Judgement, paras 48-51.

<sup>907</sup> *Blaškić* Trial Judgement, para 180. See also *Kordić* Appeals Judgement, para 53.

<sup>908</sup> See *supra*, para 281.

## 2. Findings

284. The Chamber has already found that on 6 December 1991 there was an attack launched by the JNA forces against the Old Town of Dubrovnik.<sup>909</sup> It is also the finding of the Chamber, as recorded earlier, that there were no military objectives within the Old Town and the attack was not launched or maintained in the belief that there were.<sup>910</sup> It is possible that there may have been individuals in the Old Town on 6 December 1991 who were connected with the Croatian defending forces, however, any such persons did not fire on JNA forces or undertake any overt military activity. Their presence could not change the character of the population. It was properly characterised as a civilian population, and the objects located there were civilian objects. As regards the Defence submission concerning alleged military activities of the Crisis Staff, the headquarters of which was located in the Old Town,<sup>911</sup> the Chamber notes that no persuasive evidence has been supplied to the effect that the Crisis Staff was conducting military operations from the Old Town.<sup>912</sup> On the contrary, Đelo Jusić testified that the Crisis Staff did not deal with issues of defence.<sup>913</sup> Mato Valjalo stated that its members did not fight and did not wear uniforms.<sup>914</sup> It was his testimony that the headquarters of the Territorial Defence was in Lapad.<sup>915</sup> There is nothing in the evidence to suggest that the building of the Crisis Staff made “an effective contribution to military action” or that its destruction would offer “a definite military advantage”.<sup>916</sup> Accordingly, the Chamber finds on the evidence in this case that the presence of the Crisis Staff in a building located in the Old Town did not render the building a legitimate military objective. The Chamber would also note that the building in question was not proved to have been damaged<sup>917</sup> during the shelling so that this Defence submission apparently lacks factual foundation.

285. On 6 December 1991, the evidence is unequivocal that the Old Town was, as it still is, a living town. Though a protected World Heritage site, it had a substantial resident population of between 7,000 and 8,000,<sup>918</sup> many of whom were also employed in the Old Town, as were very

<sup>909</sup> See *supra*, paras 99-119; 121-145.

<sup>910</sup> See *supra*, paras 193-194.

<sup>911</sup> Defence Final Brief, paras 204-206.

<sup>912</sup> Prosecution Final Brief, paras 232-233.

<sup>913</sup> Đelo Jusić, T 3206-3207.

<sup>914</sup> Mato Valjalo, T 2091.

<sup>915</sup> Mato Valjalo, T 1997.

<sup>916</sup> Article 52 para 2 of Additional Protocol I, *see supra*, footnote 885.

<sup>917</sup> The headquarters of the Crisis Staff was located at the Rector's palace, Đelo Jusić, T 3207; Đorđe Ciganović, T 2903. Slavko Grubišić testified: “At the rector's palace, as far as I was able to see from the outside, because a shell had landed between the cathedral and the rector's palace, from the north, or rather, the south side, from the cathedral, on those beautiful stones, there are still marks made by shrapnel. It's pock-marked by shrapnel still.” T 1043. However, this evidence is not indicative of proving that the damage occurred as result of this shell. Moreover, P63/6, Annex 1 shows six projectile impacts marked as “4” and “6” in the northern and eastern area of the outer walls of the Rector's Palace as being damaged in October/November.

<sup>918</sup> Dr John Allcock, T 461-464 ; Exhibit P14.

many others who came to the Old Town from the wider Dubrovnik to work.<sup>919</sup> The Old Town was also a centre of commercial and local government activity and religious communities lived within its walls. Because of, and under the terms of, the JNA blockade, some women and children had temporarily left the Old Town, but many remained. In addition, families and individuals displaced by the JNA advance on Dubrovnik had found shelter in the Old Town.<sup>920</sup> Some people from the wider Dubrovnik had also been able to take up temporary residence in the Old Town during the blockade in the belief that its World Heritage listing would give them protection from military attack.<sup>921</sup> The existence of the Old Town as a living town was a renowned state of affairs which had existed for centuries. The residential situation in the wider Dubrovnik was, in many respects quite similar and a renowned state of affairs. The wider Dubrovnik was a substantial residential and commercial centre with a large resident population the numbers of whom had been swelled by refugees who had been displaced from other towns and villages by the JNA advance.<sup>922</sup>

286. In addition to this long established and renowned state of affairs, it is clear from the evidence that the JNA forces had both the wider Dubrovnik and the Old Town under direct observation from many positions since its forces had closed in on Dubrovnik in November.<sup>923</sup> The presence and movements of a large civil population, in both the Old Town and the wider Dubrovnik, of necessity would have been obvious to this close military observation. Of course, JNA leaders, including the Accused and Admiral Jokić were directly concerned with negotiations with *inter alia* representatives of the civilian population. Further, one apparent objective of the JNA blockade of Dubrovnik was to force capitulation of the Croatian defending forces by the extreme hardship the civilian population was being compelled to endure by virtue of the blockade. In the Chamber's finding it is particularly obvious that the presence of a large civilian population in the Old Town, as well as in the wider Dubrovnik, was known to the JNA attackers, in particular the Accused and his subordinates, who variously ordered, planned and directed the forces during the attack.

287. One or two particular aspects of the evidence related to the issue of a civilian population in the Old Town, and in the wider Dubrovnik, warrants particular note. On 6 December 1991 the attacking JNA soldiers could hear that a defence or air-raid alarm was sounded at about 0700 hours on 6 December 1991 in Dubrovnik.<sup>924</sup> In his report concerning that day Lieutenant-Colonel Jovanović, commanding the 3/5 mtbr, purported to assume that after the alarm the city dwellers had

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<sup>919</sup> Paul Davies, T 579.

<sup>920</sup> Paul Davies, T 574.

<sup>921</sup> Paul Davies, T 579.

<sup>922</sup> With respect to the fact that the Old Town was a populated civilian town, the Chamber notes that a concert was held on 5 December 1991 to commemorate the 200 year anniversary of Mozart's death, Đelo Jusić, T 3067.

<sup>923</sup> See *supra*, paras 56-60; 70.

hidden in shelters. Hence, as he asserted in evidence, he ordered firing on the basis that anyone who was still moving around in the Dubrovnik residential area was participating in combat activities.<sup>925</sup> This view assumes, of course, the presence of civilians but seeks to justify the targeting of persons and vehicles moving about on the basis suggested. The view which Lieutenant-Colonel Jovanović purported to hold on that day does not hold up to scrutiny. Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian and that many civilian inhabitants had sound reasons for movement about Dubrovnik during the 10 ½ hours of the attack. An obvious example is those trying to reach the wounded or to get them to hospital. Others sought better shelter as buildings were damaged or destroyed. Others sought to reach their homes or places of work. There are many more examples. The purported view of Lieutenant-Colonel Jovanović stands in contradiction with the testimony of another JNA officer, Captain Nešić, who said that he did see city-dwellers, to whom he referred as “civilians”, moving about. He specifically accepted that those civilians were not jeopardising him and his unit.<sup>926</sup> The presence of civilians within the Old Town was also directly communicated to the JNA at command level by the protests they received on that day from the Crisis Staff. The JNA war diary contains the record of a complaint made by Minister Rudolf to the Accused. The complaint relates to casualties and wounded persons in Dubrovnik, as well as the hitting of the Franciscan Monastery.<sup>927</sup> In the finding of the Chamber the view expressed by Lieutenant-Colonel Jovanović, and on which he acted in targeting the mortars of the 3/5 mtbr which he commanded on 6 December 1991, was clearly false. It was contrived to try to justify what was in truth the indiscriminate targeting of civilian people, vehicles and buildings in the wider Dubrovnik (albeit to the north-west of the Old Town because the Old Town was beyond the range of his mortars) without any military justification.

288. The Chamber has found that the Old Town was extensively targeted by JNA artillery and other weapons on 6 December 1991<sup>928</sup> and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA.<sup>929</sup> Hence, in the Chamber’s finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town. The Chamber has, in addition, found that a relatively few military objectives (actual or believed) in the wider city of Dubrovnik, but outside the Old Town, were targeted by JNA forces on 6 December 1991. These were, in most cases, widely separated and in positions distant from the Old Town. Shelling targeted at the Croatian military positions in the wider Dubrovnik, including those closer to the Old Town,

<sup>924</sup> Captain Nešić, T 8230; Lieutenant-Colonel Jovanović, T 8112-8113; Exhibit D108.

<sup>925</sup> Exhibit D108.

<sup>926</sup> Captain Nešić, T 8231.

<sup>927</sup> Exhibit D96, p 71, entry at 1600 hours.

<sup>928</sup> See *supra*, para 214.

and whether actual or believed positions, would not cause damage to the Old Town, for reasons given in this decision. That is so for all JNA weapons in use on 6 December 1991, including mortars. In addition to this, however, the Chamber has found there was also extensive targeting of non-military objectives outside the Old Town in the wider city of Dubrovnik.

289. As found elsewhere in this decision, the deliberate JNA shelling of the Old Town on 6 December 1991 has been proved to have resulted in the death of two civilians and caused injuries to civilians.<sup>930</sup> There was also extensive damage to civilian objects.<sup>931</sup> Accordingly, and leaving aside for the present the issue of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of attacks on a civilian population and civilian objects have been established.

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<sup>929</sup> See *supra*, paras 193-194.

<sup>930</sup> See *supra*, paras 250; 259; 270; 276.

<sup>931</sup> See *infra*, paras 326-327.

## C. Crimes against property, including cultural property (Counts 4 and 6)

### 1. Law on devastation not justified by military necessity (Count 4)

290. Count 4 of the Indictment charges the Accused with devastation not justified by military necessity, punishable as a violation of the laws or customs of war under Article 3(b) of the Statute.<sup>932</sup>

291. Article 3(b) codifies two crimes: “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”. Only the latter is charged in the present case. From a linguistic point of view, the meaning of the two terms, “devastation” and “destruction,” is largely identical.<sup>933</sup> Moreover, the two offences have been treated together by a number of instruments of international humanitarian law.<sup>934</sup> At least in the context of this case, which is concerned with the destruction of buildings in the Old Town of Dubrovnik, the Chamber considers it appropriate to equate the two crimes, while recognising that in other contexts, *e.g.* laying waste to crops or forests, the crime of devastation may have a wider application.

292. While the crime of “devastation not justified by military necessity” has scarcely been dealt with in the Tribunal’s jurisprudence,<sup>935</sup> the elements of the crime of “wanton destruction not justified by military necessity” were identified by the Trial Chamber in the *Kordić* case, and recently endorsed by the Appeals Chamber in that same case, as follows:<sup>936</sup>

- (i) the destruction of property occurs on a large scale;
- (ii) the destruction is not justified by military necessity; and

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<sup>932</sup> For the general requirements for the application of Article 3, *see supra*, paras 227-233.

<sup>933</sup> The Oxford English Dictionary defines the notion of devastation as “a wasting, spoiling, desolation, or destruction” and refers to recorded usage of the term in this context from as early as 1502. It further defines the notion of “devastation” as “the action of devastating, or condition of being devastated, laying waste; wide-spread destruction, ravages.” The Oxford English Dictionary, Volume IV, Clarendon Press, Oxford, 1998.

<sup>934</sup> The “List of War Crimes” prepared by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, which was presented to the Preliminary Peace Conference in Paris on 29 March 1919, listed the war crime of “Wilful devastation and destruction of property” as a crime recognised by international law at the time. Later, the Nuremberg Charter in Article 6(B) listed the two offences together (“wanton destruction of cities, towns or villages, or devastation not justified by military necessity”) as a war crime. The two crimes were also listed side by side in Article II, para 1(b) of the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946). The Chamber further notes Articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

<sup>935</sup> The only judgements dealing with this are the *Blaškić* Trial Judgement, paras 183, 510, 534; the *Blaškić* Appeals Judgement, para 426; the Brdanin Trial Judgement, paras 591-593, 600-639. The Trial Chamber in the *Blaškić* case found the accused Blaškić guilty under Article 3(b) with regard to “devastation not justified by military necessity” but did not provide for a definition of the elements, *see Blaškić* Trial Judgement para 183. Nor did the Appeals Chamber in the same case, stating solely that the events in Vitez and Stari Vitez constituted “devastation” according to Article 3(b), *see Blaškić* Appeals Judgement, para 426. In the *Brdanin* case the Trial Chamber did not differentiate between the two offences set out in Article 3(b), *see Brdanin* Trial Judgement, paras 591-593.

<sup>936</sup> *Kordić* Trial Judgement, para 346 and *Kordić* Appeals Judgement, para 74. This definition was also accepted by the Trial Chamber in the *Naletilić* Trial Judgement, para 579.

(iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

293. At least in the context of the present trial this definition appears equally applicable to devastation. The Chamber will adopt this definition, with appropriate adaptions to reflect “devastation,” for the crime of “devastation not justified by military necessity.” Both the Prosecution and the Defence submit that this should be done.<sup>937</sup>

294. Turning to the first element, that is, that the devastation occurred on a “large scale”, the Chamber is of the view that while this element requires a showing that a considerable number of objects were damaged or destroyed, it does not require destruction in its entirety of a city, town or village.<sup>938</sup> The Chamber will not pronounce on the question whether there is any identity between the term “large scale” in this context and the term “extensive” in the context of the crime of “extensive destruction of property” pursuant to Article 2(d) of the Statute. The facts of this case do not require it.

295. The second requirement is that the act is “not justified by military necessity”. The Chamber is of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.<sup>939</sup> Whether a military advantage can be achieved must be decided, as the Trial Chamber in the *Galić* case held, from the perspective of the “person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”<sup>940</sup> In other words, each case must be determined on its facts. Recalling its earlier finding that there were no military objectives in the

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<sup>937</sup> Prosecution Final Brief, para 178; Defence Final Brief, para 610. The Chamber is aware of the fact that neither the Prosecution nor the Defence distinguish the crime of “destruction of property not justified by military necessity” underlying the *Kordić* Trial Judgement and the crime of “devastation not justified by military necessity” being at issue in the present case.

<sup>938</sup> See e.g. *Naletilić* Trial Judgement, in which the Trial Chamber found the accused Naletilić guilty under Article 3(b) for “wanton destruction not justified by military necessity” regarding the village of Doljani, in which half of the houses had been destroyed, paras 584, 596.

<sup>939</sup> The same approach was used in the *Galić* Trial Judgment, para 51. This corresponds with the definition of a military objective as referred to in the Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992), Annex XI.A, The battle of Dubrovnik and the law of armed conflict, X. C., according to which “military objectives are those objects which by their nature, location, purpose or use: (a) make an effective contribution to military action, and (b) whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. For additional definitions of military necessity, see also Article 14 of the 1863 Lieber Code as follows: “Military necessity, as understood in modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.” See also the ICRC Dictionary of the international law of armed conflict, according to which “military necessity, in its wider sense, means doing what is necessary to achieve war aims” (Pietro Vierri, *Dictionary of the international law of armed conflict*, ICRC, 1992, p 75).

Old Town on 6 December 1991,<sup>941</sup> the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.

296. According to the consistent case-law of the Tribunal the *mens rea* requirement for a crime under Article 3(b) is met when the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts.<sup>942</sup>

297. In sum, the elements of the crime of “devastation not justified by military necessity”, at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.

## 2. Law on destruction or wilful damage of cultural property (Count 6)

298. Count 6 of the Indictment charges the Accused with destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, punishable under Article 3(d) of the Statute.

299. Article 3(d) of the Statute reads:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

...

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

300. This provision has been interpreted in several cases before the Tribunal to date. The *Blaškić* Trial Chamber adopted the following definition:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.<sup>943</sup>

301. The *Naletilić* Trial Judgement, while rejecting the *Blaskić* holding that, in order to be protected, the institutions must not have been located in the immediate vicinity of military objectives,<sup>944</sup> held that the elements of this crime with respect to destruction of institutions dedicated to religion would be satisfied if: “(i) the general requirements of Article 3 of the Statute

<sup>940</sup> *Galic* Trial Judgment, para 51.

<sup>941</sup> See *supra*, paras 193-194; 214.

<sup>942</sup> See *Kordić* Trial Judgement, para 346; *Brđanin* Trial Judgement, para 593.

<sup>943</sup> *Blaskić* Trial Judgement, para 185.

are fulfilled; (ii) the destruction regards an institution dedicated to religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property.”<sup>945</sup>

302. Further, the *Kordić* Trial Judgement held that while this offence overlaps to a certain extent with the offence of unlawful attacks on civilians objects, when the acts in question are directed against cultural heritage, the provision of Article 3(d) is *lex specialis*.<sup>946</sup>

303. In order to define the elements of the offence under Article 3(d) it may be useful to consider its sources in international customary and treaty law. Acts against cultural property are proscribed by Article 27 of the Hague Regulations of 1907, by the Hague Convention of 1954, by Article 53 of Additional Protocol I and by Article 16 of Additional Protocol II.

304. Article 27 of the Hague Regulations of 1907 reads:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

305. Article 4 of The Hague Convention of 1954 requires the States Parties to the Convention to:

1. [...] respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only when military necessity imperatively requires such a waiver.

...

4. They shall refrain from any act directed by way of reprisals against cultural property.

306. Article 53 of Additional Protocol I reads:

Without prejudice to the Provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, and of other relevant international instruments, it is prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;

(b) to use such objects in support of the military effort;

(c) to make such objects the object of reprisals.

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<sup>944</sup> *Naletilić* Trial Judgement, para 604.

<sup>945</sup> *Naletilić* Trial Judgement, para 605.

<sup>946</sup> *Kordić* Trial Judgement, para 361.

This text is almost identical in content to the analogous provision in Additional Protocol II (Article 16) the only differences being the absence in the latter of a reference to “other relevant international instruments” and the prohibition on making cultural property the object of reprisals.

307. The Hague Convention of 1954 protects property “of great importance to the cultural heritage of every people.”<sup>947</sup> The Additional Protocols refer to “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”<sup>948</sup> The *Kordić* Appeals Judgement, referring to the ICRC Commentary to Article 53 of Additional Protocol I, stated that despite this difference in terminology, the basic idea [underlying the two provisions] is the same.<sup>949</sup> Whether there may be precise differences is not an issue raised by the facts of this case. The Chamber will limit its discussion to property protected by the above instruments (hereinafter “cultural property”).<sup>950</sup>

308. While the aforementioned provisions prohibit acts of hostility “directed” against cultural property, Article 3(d) of the Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property. Therefore, a requisite element of the crime charged in the Indictment is actual damage or destruction occurring as a result of an act directed against this property.<sup>951</sup>

309. The Hague Regulations of 1907 make the protection of cultural property dependent on whether such property was used for military purposes.<sup>952</sup> The Hague Convention of 1954 provides for an obligation to respect cultural property. This obligation has two explicit limbs, *viz.* to refrain “from any use of the property and its immediate surroundings... for purposes which are likely to expose it to destruction or damage in the event of armed conflict”, and, to refrain “from any act of hostility directed against such property.”<sup>953</sup> The Convention provides for a waiver of these obligations, however, but only when “military necessity imperatively requires such a waiver.”<sup>954</sup> The Additional Protocols prohibit the use of cultural property in support of military efforts, but make no explicit provision for the consequence of such a use, *i.e.* whether it affords a justification for acts of hostility against such property. Further, the Additional Protocols prohibit acts of

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<sup>947</sup> Article 1, The Hague Convention of 1954.

<sup>948</sup> Article 53, Additional Protocol I; Article 16, Additional Protocol II.

<sup>949</sup> *Kordić* Appeals Judgement, para 91.

<sup>950</sup> The Chamber makes this clarification in light of the recent *Kordić* Appeals Judgement in which the Chamber found that not all educational institutions listed in Article 3(d) of the Statute would qualify as cultural property protected under Article 53 of Additional Protocol I. It held that some educational institutions would be protected as civilian objects under Article 52 of Additional Protocol I instead of cultural property under Article 53. (*Kordić* Appeal Judgement, para 92).

<sup>951</sup> See also, third *Tadić* condition, *supra*, para 232. *Tadić* Appeal Jurisdiction Decision, para 94.

<sup>952</sup> Article 27 of The Hague Regulations of 1907 reads in the relevant part “...provided they are not being used at the time for military purposes.”

<sup>953</sup> Article 4, para 1 of The Hague Convention of 1954.

hostility against cultural property, without any explicit reference to military necessity. However, the relevant provisions of both Additional Protocols are expressed to be “[w]ithout prejudice to” the provisions of the Hague Convention of 1954.<sup>955</sup> This suggests that in these respects, the Additional Protocols may not have affected the operation of the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver. In this present case, no military necessity arises on the facts in respect of the shelling of the Old Town, so that this question need not be further considered. For the same reason, no consideration is necessary to the question of what distinction is intended (if any) by the word “imperatively” in the context of military necessity in Article 4, paragraph 2 of the Hague Convention of 1954.

310. Nevertheless, the established jurisprudence of the Tribunal confirming the “military purposes” exception<sup>956</sup> which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaskić* and *Naletilić* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), and leaving aside any implication of the issue of imperative military necessity, the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection.<sup>957</sup> Therefore, contrary to the Defence submission,<sup>958</sup> the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were “directed against” that cultural property, rather than the military installation or use in its immediate vicinity.

311. As for the *mens rea* element for this crime, the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an

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<sup>954</sup> Article 4, para 2 of The Hague Convention of 1954.

<sup>955</sup> Article 53, Additional Protocol I; Article 16, Additional Protocol II.

<sup>956</sup> *Blaskić* Trial Judgement, para 185; *Kordić* Trial Judgement, para 362; *Naletilić* Trial Judgement, para 922; *Brđanin* Trial Judgement, para 598.

<sup>957</sup> As Article 27 of The Hague Regulations explicitly refers to “in sieges and bombardments”, it is not because of the location of cultural property, but because of their use when cultural property loses its protection. Article 16 of the Second Protocol of the Hague Convention of 1954 strengthens this view. It states, as a waiver of the protection of cultural property, that “when and as long as (i) that cultural property has, by its function, been made into a military objective”. (emphasis added). See also *Naletilić* Trial Judgement, para 604.

<sup>958</sup> Defence Final Trial Brief, paras 615, 617.

acceptable form of *mens rea* for this crime, but that is an issue not directly raised by the circumstances of this case.

312. In view of the above, the definition established by the jurisprudence of the Tribunal appears to reflect the position under customary international law. For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.

### 3. Findings on Counts 4 and 6

313. The Accused must answer charges that at least some degree of damage or destruction was sustained by 116<sup>959</sup> buildings and structures in the course of the 6 December attack on the Old Town of Dubrovnik. These are listed in the Annex to the Rule 98bis Decision.<sup>960</sup> They include the six buildings alleged to have been completely destroyed in the attack: namely: Palace – Od Sigurate 1 (Festival Palace), Palace – Od Sigurate 2, Palace Martinušić – Sv. Josipa 1, Palace – Od Puča 11, Palace – Od Puča 16, Palace Sorkočević – Miha Pracata 6.<sup>961</sup> In addition, the Prosecution submits that it has proven damage to the Institute for the Protection of Cultural Monuments (C1), a building not listed in the Annex, resulting from the 6 December attack on the Old Town.<sup>962</sup>

314. The Prosecution submits that the six buildings identified in paragraph 23 of the Indictment were destroyed by fire on 6 December 1991 during the JNA shelling of the Old Town.<sup>963</sup> The Prosecution concedes that “[a]lthough the eye-witnesses [...] could not give direct evidence of the origin of the firing of the shells, the only inference available, on the totality of the evidence, is that the JNA fired them into the Old Town.”<sup>964</sup> The Prosecution further submits that it has proven that the 116 buildings and structures listed in the Annex to the Rule 98bis Decision, and additionally,

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<sup>959</sup> In the course of the Rule 98bis Decision, the original list of 450 buildings listed in Schedule II to the Indictment, which had been allegedly destroyed and damaged as a result of the 6 December shelling, was substantially reduced.

<sup>960</sup> Rule 98bis Decision, Annex: Part A listed 96 buildings and structures identified in Schedule II of the Indictment; Part B listed 20 buildings and structures that could not be readily identified in Schedule II of the Indictment but which were located in the Old Town.

<sup>961</sup> Indictment, para 23.

<sup>962</sup> Prosecution Final Brief, paras 193-194.

<sup>963</sup> Prosecution Final Brief, para 183.

<sup>964</sup> Prosecution Final Brief, para 183.

the office of the Institute for Protection of Cultural Monuments (C1), sustained damage as a result of the shelling on 6 December 1991.<sup>965</sup>

315. The Defence submits that the testimony of the Prosecution witnesses involved “an excessive and incorrect exaggeration of the damages incurred in the Old Town”.<sup>966</sup> Additionally, the Defence claims that the testimony of these witnesses is “unreliable, biased and false”.<sup>967</sup> As noted by the Chamber in its general comments on the evidence earlier in this decision, some evidence of damage was less than satisfactory. Its effect was in many cases to exaggerate damage. The Chamber has given full effect to this in its evaluation of the credibility of the evidence of damage in its Rule 98bis Decision and in what follows.

316. In general terms, the Chamber’s findings on these Counts are based on the evidence which it has accepted of citizens of Dubrovnik<sup>968</sup> or persons visiting the Old Town during or immediately after the attack,<sup>969</sup> and evidence such as that of a monitor from the ECMM, Per Hvalkof, who walked around in the Old Town on the day after the attack and described the town as “horrible” looking and “very badly damaged”; he thought the Old Town looked like a “missile garbage lot”.<sup>970</sup> In reaching its finding the Chamber has also relied on video evidence<sup>971</sup> and various reports compiled after the attack, and has been assisted by its site visit.<sup>972</sup> The Chamber has also relied on this evidence in the determination of how many, and exactly which, buildings and structures were damaged during the 6 December shelling of the Old Town.

317. As discussed above,<sup>973</sup> the Chamber has found that there was an artillery attack by the JNA forces under the command of the Accused on the Old Town of Dubrovnik on 6 December 1991.

318. The Chamber finds that of the 116 buildings and structures it listed in the Annex to its Rule 98bis Decision, 52 were destroyed or damaged during the 6 December shelling of the Old Town by the JNA. The Chamber’s findings in relation to these 52 buildings and structures are

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<sup>965</sup> Prosecution Final Brief, paras 193-194; the Prosecution marked all 116 buildings and structures, plus C1, on the map submitted as Annex IV to its Brief.

<sup>966</sup> Defence Final Brief, para 510. The submissions of the Defence on the military presence in the Old Town and military objectives are presented in *supra*, paras 182-214.

<sup>967</sup> Defence Final Brief, paras 510, 520.

<sup>968</sup> Lucijana Peko, T 1966-1967; Zineta Oresta, T 3475; Witness A, T 3636; Nikola Jović, T 2952, 2964-2965; Slavko Grubišić, T 1045; Slobodan Vuković, T 5826-5829.

<sup>969</sup> Đorđe Čiganović, T 2734-2735; Lars Brolund, T 879-881; Per Hvalkof, T 2208, 2214; Minister Rudolf, T 5619; Colin Kaiser, T 2435-2436.

<sup>970</sup> Per Hvalkof, T 2214, T 2208.

<sup>971</sup> Exhibit P66 at 34:51-37:00; 37:38-37:53; Exhibit P145 at 00:08-21:15; Exhibit P78 at 13:40-43:29.

<sup>972</sup> Exhibit P164 describes the damage as “significant”, p 2; Exhibit P63/6 “Houses were smoking, rubble was everywhere and the streets were dangerous as broken tiles were being thrown down from the roofs and cornices and bits of roof threatened to fall off, though this did not prevent anyone from passing by anyway [...] the people of Dubrovnik [...] stared at the damage in astonishment.”, p 32; Exhibit C1/1, pp 16-23.

<sup>973</sup> See *supra*, paras 99-119; 121-145.

included in an Annex attached to this Judgement, and the evidence upon which the Chamber has relied in making these findings is referenced therein.<sup>974</sup> The Chamber will set out below why it cannot be satisfied to the required standard that the other 64 buildings and structures of the 116, and the additional building (C 1), were destroyed or damaged in that attack. The Chamber emphasises that the list of 52 should not be understood as representing an exhaustive list of the buildings and structures damaged during the 6 December 1991 JNA attack. The Chamber has necessarily had to confine its findings to those buildings listed in the Indictment and which remained listed in the Annex to the Rule 98bis Decision. In particular, it was not always possible to relate evidence of damage to the buildings listed therein.

319. The nature and extent of the damage to the 52 buildings and structures from the 6 December 1991 attack varied considerably as is apparent from the evidence identified in the footnotes in the Annex. It is unnecessary to attempt to detail all of the damage in this decision. The most seriously affected were six buildings which were completely destroyed, *i.e.* burned out, on 6 December 1991.<sup>975</sup> Several of the 52 buildings and structures had sustained some degree of damage from earlier shelling in October and November.<sup>976</sup> This earlier damage has been identified by the Chamber so that it is not attributed to the 6 December 1991 attack. In the result, from its analysis of the damage, the Chamber is satisfied that the previously damaged buildings sustained further and significant damage during the 6 December attack.

320. The Chamber also observes that among those buildings which were damaged in the attack, were monasteries, churches, a mosque, a synagogue and palaces.<sup>977</sup> Among the other buildings affected were residential blocks, public places and shops; damage to these would have entailed grave consequences for the residents or the owners, *i.e.* their homes and businesses suffered substantial damage.<sup>978</sup>

321. In reaching its findings that the evidence is insufficient in respect of the other 64 buildings and structures the Chamber is lead by the following considerations. The evidence of damage to those 64 buildings and structures derives from the extracts from the “Preliminary Report on War Destruction Sustained by the Ancient City Centre of Dubrovnik in October, November and

<sup>974</sup> See Annex I. The Chamber has retained both the sequential numbers, corresponding to the original 450 buildings and structures as they appear in Schedule II to the Indictment, and the sequential numbers (A1-A96 and B1-B20) given in the course of the Rule 98 bis Decision, for the purposes of identification.

<sup>975</sup> See Annex I Nos: J9, J10, J11, J20, J21 and J26. For the Chamber’s position on the Defence argument that five out of the six burnt buildings were owned “by persons from Serbia or Montenegro” (Defence Final Brief, para 518), see *supra* paras 180-181.

<sup>976</sup> Amongst the structures which sustained damage during the October and November shelling of the Old Town were the Franciscan monastery, Sponza Palace and the city port. See *supra*, paras 50 and 62.

<sup>977</sup> E.g. Franciscan Monastery, Orthodox Church, St Vlaho (St Blaise) Church, Mosque, Synagogue, Onofrio Fountain, Cathedral etc. See Annex I, the buildings listed under Nos: J4, J16, J13, J19, J35, J7 and J12.

December 1991” compiled by the “Institute for Protection and Conservation of the Historical Monuments” of Dubrovnik (hereinafter “Institute Report”).<sup>979</sup> The Institute Report purports to deal with damage between 1 October and 31 December 1991, which of course includes damage caused on 6 December 1991, and subject of the Indictment, but it is necessary to be able to separate damage of 6 December from all other damage. While the Institute Report itself purports to specify damage occurring on 6 December 1991 by the date of damage given for each object surveyed, this specification has been shown not to be always accurate.<sup>980</sup>

322. Although two witnesses, architects Lucijana Peko and Slobodan Vuković, who personally carried out inspections of the damage sustained by the buildings and structures in the Old Town, vouched generally for the accuracy and reliability of the extracts from the Institute Report,<sup>981</sup> the Chamber notes that the entries in the Institute Report were recorded on the basis of hearsay evidence. In most of the cases, information was collected from unknown persons who are described merely as neighbours or tenants.<sup>982</sup> Whether those neighbours or tenants spoke from personal knowledge or hearsay knowledge is not known.

323. Moreover, the Chamber notes that these two witnesses had not had previous experience in inspecting war damage. Neither they, nor the members of their inspection teams, had expertise in ballistic or criminal investigation.<sup>983</sup> The cross-examination of Slobodan Vuković on the contents of his part of the Institute Report revealed many inaccuracies and material typographical errors.<sup>984</sup> Finally, the Chamber recalls that the Institute Report was originally conceived as, and still bears the title “preliminary report”, *i.e.* the expectation of its authors was that a final report on damage would follow.<sup>985</sup> However, no final report has been presented in the case. Colin Kaiser, one of the UNESCO consultants tasked to assist in assessing the damage sustained from the October and

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<sup>978</sup> See Annex I, *e.g.* Nos: J11, J14, J15, J17, J22, J23, J25, J34, J39, J46 and J49.

<sup>979</sup> The Institute Report was marked for identification as Exhibit MFI/P51 but was never admitted into evidence in its entirety. However, the extracts from it were admitted as Exhibits P174, P212 and P52. See *Prosecutor v Pavle Strugar*, Case No. IT-01-42-T, Decision on the Admissibility of Certain Documents, 26 May 2004, pp 8-11.

<sup>980</sup> It has been effectively pointed out during the cross-examination of Colin Kaiser that the damage described as damage of 6 December 1991 also included other damage which may have been incurred earlier (T 2556-2574). Colin Kaiser states that although the intention was to catalogue damage from 6 December 1991, it appears that other damage has been recorded. He could not guarantee that all the damage from the earlier period is contained in the report (T 2580-2584); Lucijana Peko, although insisting that during inspections she was able to “distinguish between old damage and recent damage” (T 1910-1911), concedes that she was not asked to distinguish between damage sustained in October/November and December and that, although, she was asked to “register all the damage that was sustained on the 6<sup>th</sup> of December”, the Institute Report includes the damage from all three months, T 1912.

<sup>981</sup> Lucijana Peko confirms the list of buildings (Exhibit P52) which she personally examined, T 1862; 1944; Slobodan Vuković confirms the accuracy of the extracts from the Report on buildings which he personally examined (Exhibit P174), T 5922.

<sup>982</sup> *E.g.* Slobodan Vuković, T 6087-6093, 6101; Lucijana Peko, T 1922 ; 1923-1924.

<sup>983</sup> Slobodan Vuković, T 6045-6047; Lucijana Peko, T 1922-1923. The matter was also raised in the Defence Final Brief, para 519 and the Prosecution Final Brief, paras 201-202.

<sup>984</sup> See *e.g.* Slobodan Vuković, T 6052-6056.

<sup>985</sup> Slobodan Vuković, T 5900-5901, 6080-6081; Lucijana Peko, T 1871, 1891-1895, 1973-1974; Colin Kaiser, T 2555.

November attacks, could not vouch for the accuracy of the Institute Report, stating “You know I didn’t carry out this survey. You know I wasn’t looking at the teams. You know I am not responsible for this work.”<sup>986</sup>

324. The Chamber, in determining what weight to attach to the submitted extracts of the Institute Report, concludes that the Report can be relied upon only to the extent it is confirmed by other evidence presented in this case, *i.e.* witness statements, other reports and video evidence.<sup>987</sup> The Chamber has proceeded on this basis.

325. As to the alleged damage to the office of the Institute itself (C1) the only evidence offered is the testimony of Colin Kaiser. His statement is, however, in this respect too vague to serve as a basis for a finding of damage to this particular building.<sup>988</sup>

326. In relation to Count 4 specifically, the Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA attack. In this regard, the Chamber has considered the following factors: that 52 individually identifiable buildings and structures were destroyed or damaged; that the damaged or destroyed buildings and structures were located throughout the Old Town and included the ramparts surrounding it; that a large number of damaged houses bordered the main central axis of the Old Town, the Stradun, which itself was damaged, or were in the immediate vicinity thereof; and finally, that overall the damage varied from totally destroyed, *i.e.* burned out, buildings to more minor damage to parts of buildings and structures.

327. In relation to Count 6 specifically, the Chamber observes that the Old Town of Dubrovnik in its entirety<sup>989</sup> was entered onto the World Heritage List in 1979 upon the nomination of the SFRY.<sup>990</sup> The properties inscribed on the World Heritage List include those which, “because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science.”<sup>991</sup> The Chamber is of the view that all the property within the Old Town, *i.e.* each structure or building, is within the scope of Article 3(d) of the Statute. The Chamber therefore concludes that the attack launched by the JNA forces against

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<sup>986</sup> Colin Kaiser, T 2695-2696.

<sup>987</sup> *E.g.* when video evidence was indicative of the recent damage, *i.e.*, amount of debris, the Chamber could conclude that the damage was recent. Here the Chamber also recalls the testimony of Slobodan Vuković who said that it was an “instantaneous” practice to clear the streets of debris, Slobodan Vuković, T 5830-5831.

<sup>988</sup> Colin Kaiser, T 2431-2432.

<sup>989</sup> The Old Town comprised: “The urban historical complex of Dubrovnik includes all the buildings erected from the XIIth to the XVIth century, within the precincts of the fortified walls. It covers an area of 15,2 ha [...] The boundaries of the historical urban complex are precisely defined by the fortified walls, the former moats and, on the southern side, by the steep coast-line.”, P63/2, p 1.

<sup>990</sup> Colin Kaiser, T 2378-2379, Exhibits P63/2, P63/7; Exhibit P14, p 11.

<sup>991</sup> Convention concerning the protection of the world cultural and natural heritage, adopted by the General Conference at its seventeenth session, Paris, 16 November 1972, Exhibit P63/11, Article 1.

the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, in so far as that provision relates to cultural property.

328. In relation to Count 6, there is no evidence to suggest that any of the 52 buildings and structures in the Old Town which the Chamber has found to have been destroyed or damaged on 6 December 1991, were being used for military purposes at that time.<sup>992</sup> Therefore, the buildings were protected as cultural property under Article 3(d) of the Statute at the time they incurred damage. As discussed earlier, military necessity can, in certain cases, be a justification for damaging or destroying property. In this respect, the Chamber affirms that in its finding there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991,<sup>993</sup> or in the Old Town or in its immediate vicinity. In the Chamber's finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.

329. As to the *mens rea* element for both crimes the Chamber makes the following observations. In relation to Count 4, the Chamber infers the direct perpetrators' intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town.<sup>994</sup> Similarly, for Count 6, the direct perpetrators' intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town,<sup>995</sup> the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site.<sup>996</sup> As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA positions at Žarkovica and elsewhere, above the Old Town on 6 December 1991.<sup>997</sup>

330. Leaving aside for the present the question of the Accused's responsibility, the Chamber finds that all elements of the offence of devastation not justified by military necessity (Count 4) and destruction or wilful damage of cultural property (Count 6) are established.

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<sup>992</sup> See *supra*, paras 193-194.

<sup>993</sup> See *supra*, paras 203-214.

<sup>994</sup> See *supra*, paras 214; 285-288.

<sup>995</sup> See *supra*, para 214.

<sup>996</sup> See *supra*, para 21.

<sup>997</sup> The video evidence shows clearly visible emblems indicating that the buildings and the structures within the Old Town were protected, Minceta Fort, Exhibit P78 at 13:11-13:20, 13:05-13:10, 17:19-17:27, 38:21-38:32. See especially the evidence of Witness B, a JNA soldier positioned at Žarkovica during the attack on the Old Town on 6 December 1991. He testified that, on 6 December 1991, he observed some flags flying over the buildings. He personally did not know what the flags meant, "but the others were saying that those flags were there to protect the section of the town in the sense that that portion of the town was not to be targeted", T 5047-5048. Colin Kaiser further testified about the raising of three UN flags over three bastions of the walls of the Old Town on 27 November 1991, T 2384-2387.

## VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

### A. Ordering

#### 1. Law

331. This form of liability requires that at the time of the offence, an accused possessed the authority to issue binding orders to the alleged perpetrator. A formal superior-subordinate relationship between the person giving the order and the one executing it is not a requirement in itself, nor need the order be given in writing, or in any one particular form, or directly to the individual executing it.<sup>998</sup> The existence of an order may be proven through direct or circumstantial evidence.<sup>999</sup>

332. As this form of liability is closely associated with “instigating,” subject to the additional requirement that the person ordering the commission of a crime have authority over the person physically perpetrating the offence, a causal link between the act of ordering and the physical perpetration of a crime, analogous to that which is required for “instigating”,<sup>1000</sup> also needs to be demonstrated as part of the *actus reus* of ordering.<sup>1001</sup> The Chamber further accepts that, similar to instigating,<sup>1002</sup> this link need not be such as to show that the offence would not have been perpetrated in the absence of the order.

333. With regard to the requisite *mens rea*, it must be established that the accused in issuing the order intended to bring about the commission of the crime,<sup>1003</sup> or was aware of the substantial likelihood that it would be committed in the execution of the order.<sup>1004</sup> The *mens rea* of the accused need not be explicit, it may be inferred from the circumstances.<sup>1005</sup> Indeed, as *mens rea* is a state of

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<sup>998</sup> *Kordić* Trial Judgement, para 388.

<sup>999</sup> *Blaškić* Trial Judgement, para 281; *Kordić* Trial Judgement, para 388. In this respect, ordering “may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of the operations, the *modus operandi* of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command”, *Galić* Trial Judgement, para 171.

<sup>1000</sup> *Kordić* Trial Judgement, para 387; *Kvočka* Trial Judgement, para 252; *Naletilić* Trial Judgement, para 60.

<sup>1001</sup> The Appeals Chamber has recently stated that a person “who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering”, *Blaškić* Appeals Judgement, para 42 (emphasis added). In this respect, the Chamber refers to the ILC Commentary on Article 6 of the Draft Code of Crimes Against The Peace and Security of Mankind, dealing with the responsibility of a superior for ordering the commission of a crime, which states that “a corps commander must be held responsible for the acts of his subordinate commander in carrying out his orders...”, Report of the International Law Commission on the work of its 48<sup>th</sup> session, UN doc.A/51/10, p 36.

<sup>1002</sup> *Kordić* Trial Judgement, para 387; *Kvočka* Trial Judgement, para 252; *Naletilić* Trial Judgement, para 60. The “but for” test was not adopted in this respect.

<sup>1003</sup> *Kvočka* Trial Judgement, para 252.

<sup>1004</sup> *Blaškić* Appeals Judgement, para 42; *Kordić* Appeals Judgement, para 30.

<sup>1005</sup> *Galić* Trial Judgement, para 172, *Čelebić* Trial Judgement, para 328.

mind, its proof is typically a matter of inference. The standard of proof dictates, of course, that it be the only reasonable inference from the evidence.<sup>1006</sup>

## 2. Findings

334. The Indictment alleges that on 6 December 1991, the Accused ordered the unlawful artillery and mortar shelling of the Old Town of Dubrovnik conducted by forces under his command, including the forces under the command of Captain Kovačević, which were directly subordinated to the 9 VPS commanded by Admiral Jokić.<sup>1007</sup>

335. The Prosecution submits that “[a]lthough there is no direct evidence of ordering, circumstantial evidence exists such that the conclusion must be drawn that the Accused gave an express or implied order to attack Srd prior to the attack which was launched on 6 December 1991.”<sup>1008</sup> It further argues that “an express or implied order by the Accused to attack Srd on 6 December 1991 had to be an order given with the awareness of the substantial likelihood that the Old Town would also be unlawfully attacked during the course of the attack on Srd.”<sup>1009</sup> In support of its allegations, the Prosecution submits that the JNA being an orders driven army, it is highly unlikely that a commander would carry out a deliberate attack in contravention of his superior commander’s intent.<sup>1010</sup> It further refers to the alleged visit of Captain Kovačević to the command of the 2 OG on the eve of the attack and submits that the inability of two senior officers from the 9 VPS (Warship-Captain Zec and Lieutenant-Colonel Kovačević) to stop the attack expeditiously on 6 December 1991 is evidence of the fact that Captain Kovačević had received orders from a higher level.<sup>1011</sup> The Prosecution draws the same conclusion from the Accused’s alleged endorsement of Captain Kovačević’s version of the events.<sup>1012</sup> Finally, it refers to Colm Doyle’s evidence as an admission on the part of the Accused of having fired on the city of Dubrovnik.<sup>1013</sup>

336. The Defence submits that there is no evidence that the Accused issued any orders to perpetrate the acts with which he is charged.<sup>1014</sup> In particular, it argues that the Accused did not issue any orders to the 3/472 mtbr on 6 December 1991, except the order to respect the ceasefire.<sup>1015</sup> In this respect, the Defence also points out that the Accused in fact issued orders prohibiting any

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<sup>1006</sup> *Vasiljević Appeals Judgement*, paras 120 and 128.

<sup>1007</sup> Indictment, para 15.

<sup>1008</sup> Prosecution Final Brief, para 266.

<sup>1009</sup> Prosecution Final Brief, para 268.

<sup>1010</sup> Prosecution Final Brief, para 270.

<sup>1011</sup> Prosecution Final Brief, para 271.

<sup>1012</sup> Prosecution Final Brief, para 274.

<sup>1013</sup> Prosecution Final Brief, para 272.

<sup>1014</sup> Defence Final Brief, para 583.

attack on the Old Town.<sup>1016</sup> It further disputes the evidence of Colm Doyle as not relating to the Old Town,<sup>1017</sup> and emphasises that, in its submission, the attack on Srd was planned and ordered by the command of the 9 VPS.<sup>1018</sup> With respect to the required *mens rea*, the Defence submits that, in the absence of any direct intent, one cannot infer that the Accused was aware of the substantial likelihood that a crime would be committed from the mere position of the 3/472 mtbr, which was an infantry unit responsible for maintaining a blockade.<sup>1019</sup> Given the finding of the Chamber on the evidence, it is not necessary to deal expressly with all of the matters raised in the submissions of the Prosecution and the Defence.

337. Earlier in this decision, in particular when considering the interrelationship of the Accused, Admiral Jokić and General Kadijević, the Chamber has made findings material to these submissions. In particular, it is the finding of the Chamber that the Accused ordered forces under his command to take Srd.<sup>1020</sup> The order was given on 5 December 1991 for an attack on the morning of 6 December 1991.<sup>1021</sup>

338. In the finding of the Chamber the evidence does not, however, establish that there was an express order of the Accused to attack or to fire on the Old Town, or the greater city of Dubrovnik. The relevant order was directed against Srd.<sup>1022</sup>

339. That is not an end of the issue however. What occurred demonstrates, in the finding of the Chamber, that the detailed planning and execution of the order was left by the Accused to the 9 VPS<sup>1023</sup> which had geographical responsibility for Dubrovnik and its surrounds. There are unresolved issues about the role of the commander of the 9 VPS, Admiral Jokić, but, in the finding of the Chamber, his Chief of Staff Warship-Captain Zec and other 9 VPS staff officers were active in the planning and execution of the order, both on 5 and 6 December 1991.<sup>1024</sup> The plan decided on was for a quick and confined land assault by a small number of troops with artillery support.<sup>1025</sup> No air or sea forces were involved.<sup>1026</sup> All forces were drawn from the 9 VPS. The ground troops making the attack were from the 3/472 mtbr and commanded by Captain Kovačević. The 3/472 mtbr then occupied the hinterland around Srd. The 3/472 mtbr was to provide tanks and its

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<sup>1015</sup> Defence Final Brief, para 588.

<sup>1016</sup> Defence Final Brief, para 592.

<sup>1017</sup> Defence Final Brief, para 591.

<sup>1018</sup> Defence Final Brief, para 593.

<sup>1019</sup> Defence Final Brief, paras 584-587.

<sup>1020</sup> See *supra*, para 167.

<sup>1021</sup> See *supra*, para 169.

<sup>1022</sup> See *supra*, paras 166-167.

<sup>1023</sup> See *supra*, para 85.

<sup>1024</sup> See *supra*, paras 85-91.

<sup>1025</sup> See *supra*, paras 90-91.

<sup>1026</sup> Minister Rudolf, T 5618.

own considerable artillery resources to support the attack. In addition, other units of the 9 VPS were to provide further artillery support, in particular heavy 120mm mortars and howitzer cannons.<sup>1027</sup>

340. While there is evidence that Captain Kovačević, who was to lead the attack, went personally to the Accused's headquarters at Trebinje on 5 December sometime between 1700 and 1900 hours,<sup>1028</sup> that appears not to have been unusual conduct for him<sup>1029</sup> and the Chamber is not able to infer that during this visit he received any direct instructions from the Accused, or gave the Accused any details of the planning for the attack to occur the next morning. That being so, the evidence does not establish, in the Chamber's finding, that the Accused directly participated in or knew of the detailed planning for the attack. What was contemplated was, from a military viewpoint, an attack well within the competence of the 9 VPS to plan and execute. As far as is established, the Accused left this to the 9 VPS.

341. While very substantial provision was made for artillery support, the plans that were developed are not shown to be inappropriate for the objective of attacking and taking Srd. There is nothing to suggest that they were outside the scope of what was or ought to have been contemplated by the Accused in respect of the troops and artillery to be employed in the assault. So far as the evidence indicates the plan was one which, if well executed, should have enabled the successful taking of Srd well before 1200 hours on 6 December 1991.

342. While the attack ordered by the Accused was directed at Srd, it is apparent from the evidence, as noted elsewhere in this decision, that any such attack necessarily contemplated that JNA artillery fire would be necessary against any Croatian forces which threatened the JNA forces attacking Srd and jeopardised the success of the attack on Srd.<sup>1030</sup> As has been indicated the reality was obvious that, apart from the limited Croatian forces on Srd itself, any such defensive action by the Croatian forces could only come from the very limited artillery and other weapons in the wider city of Dubrovnik.

343. Given these circumstances, in the finding of the Chamber, the Accused with his very considerable military knowledge and experience, was well aware that his order to attack Srd necessarily also involved the prospect that his forces might well have need to shell any Croatian artillery and other military positions in the wider Dubrovnik which, by their defensive action,

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<sup>1027</sup> See *supra*, para 91.

<sup>1028</sup> Admiral Jokić, T 4132-4133. Admiral Jokić specified that Captain Kovačević's presence in Trebinje on 5 December 1991 was confirmed by two officers from the command of the 2 OG and by Captain Kovačević himself when Admiral Jokić spoke with him before his transfer to The Hague, T 4132-4133; 4936.

<sup>1029</sup> Admiral Jokić, T 3891-3892.

<sup>1030</sup> See *supra*, para 129.

threatened the attacking JNA troops on Srd and the success of their attack to capture Srd. That is the inference the Chamber draws.

344. As the Chamber has found earlier, the JNA forces attacking Srd did come under limited but determined Croatian mortar, heavy machine gun (anti-aircraft gun) and other fire directed from the wider Dubrovnik.<sup>1031</sup> This fire caused JNA fatalities and other casualties on Srd.<sup>1032</sup> It is clear that it threatened the success of the attack. JNA artillery fire, by which we include heavy and light mortars, cannons, ZIS guns and Maljutka rockets, was, in part, directed against a number of these Croatian defensive positions in the wider Dubrovnik.<sup>1033</sup> The JNA fire directed against these Croatian defensive positions no doubt also caused damage to property in the immediate vicinity of the military targets. The evidence does not explore that in any detail. Whether such JNA fire caused civilian casualties is not examined in the evidence. The issue whether such targeting of the wider Dubrovnik by the JNA forces had military justification or was in contravention of international obligations is one which need not be considered by the Chamber in this decision, as it falls beyond the scope of the Indictment. This targeting by the JNA, as found earlier by the Chamber, was not directed to targets in the Old Town.<sup>1034</sup> On 6 December 1991, no Croatian defensive fire was directed to Srd or to other JNA positions from the Old Town, and the JNA forces did not act under any other belief.

345. What did occur is that the JNA artillery did not confine its fire to targeting Croatian military positions, let alone Croatian positions actually firing on the JNA forces on Srd or other JNA positions. The JNA artillery which was active that day came to fire on Dubrovnik, including the Old Town, without regard to military targets, and did so deliberately, indiscriminately and extensively over a prolonged time. In respect of the shelling of the Old Town by the JNA, it caused substantial damage to civilian property and loss of life and other casualties to civilians. It is not proved that the Accused ordered this general artillery attack on Dubrovnik, or the Old Town. The evidence indicates otherwise. His order was confined to an attack on Srd.<sup>1035</sup> The implications with regard to the use of JNA artillery against Dubrovnik, of the Accused's ordered attack on Srd, has not been shown to extend to such a general artillery attack on Dubrovnik, or the Old Town.

346. For the purposes of the Accused's individual criminal responsibility, so far as it is alleged that he ordered the attack on the Old Town on 6 December 1991, the further issue arises whether the Accused was aware of the substantial likelihood that in the course of executing his order to

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<sup>1031</sup> See *supra*, para 122.

<sup>1032</sup> See *supra*, paras 123-125.

<sup>1033</sup> See *supra*, paras 196-214.

<sup>1034</sup> See *supra*, paras 193-194; 211-214.

<sup>1035</sup> See *supra*, para 167.

attack Srd, there would be a deliberate artillery attack by his forces on the Old Town. Previous JNA shelling of Dubrovnik, during which there was unauthorised shelling of the Old Town, in the course of JNA military action in October and November 1991 in the vicinity of the city of Dubrovnik, including Srd,<sup>1036</sup> would certainly have alerted the Accused that this could occur, especially as the 3/472 mtbr had been identified to him as a likely participant in the November shelling.<sup>1037</sup>

347. There were, however, relevant differences. The JNA operations in October and November 1991 each involved a general widespread attack and advance over several days by many JNA units over a wide front, with naval and air support. The attack on Srd in December 1991 was a much more limited operation both in terms of the forces engaged in the attack, the ground to be gained and the time allocated to the troops in which to do so. While the Accused's order to attack Srd necessarily had the implication of JNA artillery support against Croatian forces threatening the attacking JNA troops and the success of the attack on Srd including, if necessary, artillery fire against specific Croatian defensive positions in Dubrovnik, that implication was of limited, specifically targeted and controlled responsive fire by the Accused's forces. The escalation of JNA artillery fire on Dubrovnik into the deliberate, indiscriminate and extensive shelling which occurred, although not dissimilar to the previous episodes, was a marked step further than was implied by the Accused's order, and occurred in circumstances sufficiently different from the previous episodes as to reduce to some degree the apparent likelihood of a repetition of the previous conduct of his forces. While the circumstances known to the Accused, at the time of his order to attack Srd, can only have alerted him to the possibility that his forces would once again ignore orders and resort to deliberate and indiscriminate shelling, it must be established by the Prosecution that it was known to the Accused that there was a substantial likelihood of this occurring. The risk as known to the Accused was not slight or remote; it was clearly much more real and obvious. Nevertheless, the evidence falls short, in the Chamber's view, of establishing that there was a "substantial likelihood" that this would occur known to the Accused when he ordered the attack on Srd.

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<sup>1036</sup> See *supra*, paras 48-50; 61-67.

<sup>1037</sup> Following the shelling of the Old Town in November 1991, Admiral Jokić conducted an investigation and concluded that the 3/472 mtbr and possibly the artillery of the 472 mtbr were in a position to shell the Old Town. Admiral Jokić spoke *inter alia* with the Accused requesting the resignation of the above two officers, T 3996-3998.

### 3. Conclusion

348. By virtue of the above, the Chamber finds that it has not been established that the Accused is responsible under Article 7(1) of the Statute for ordering the attack by the JNA on the Old Town of Dubrovnik on 6 December 1991.

## **B. Aiding and abetting**

### 1. Law

349. Aiding and abetting has been defined in the case-law of the Tribunal as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime,<sup>1038</sup> before, during or after the commission of the crime,<sup>1039</sup> and irrespective of whether these acts took place at a location other than that of the principal crime.<sup>1040</sup> It is not necessary to establish a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or that such conduct served as a *conditio sine qua non* to the commission of the crime.<sup>1041</sup> However, the acts of the aider and abettor must have “a direct and substantial effect on the commission of the illegal act.”<sup>1042</sup> The *Blaškić Appeals Judgement* left open the possibility that in the circumstances of a given case an omission may constitute the *actus reus* of aiding and abetting.<sup>1043</sup> Trial Chambers have held that this is the case, for example, if a person with superior authority is present at the crime scene,<sup>1044</sup> provided that his presence had a significant encouraging effect on the principal offender,<sup>1045</sup> or if there was an explicit duty to act.<sup>1046</sup>

350. Regarding the requisite *mens rea*, it must be established that the aider and abettor was aware that his acts were assisting in the commission of the crime by the principal.<sup>1047</sup> This awareness

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<sup>1038</sup> *Blaškić Appeals Judgement*, para 46; *Vasiljević Appeals Judgement*, para 102; *Prosecutor v Duško Tadić*, Case IT-94-1-A, Judgement, 15 July 1999 (hereinafter “*Tadić Appeals Judgement*”), para 229; *Čelebići Appeals Judgement*, para 352.

<sup>1039</sup> *Blaškić Appeals Judgement*, para 48. See also *Aleksovski Trial Judgement*, para 62, *Kunarac Trial Judgement*, para 391; *Kvočka Trial Judgement*, para 256; *Naletilic Trial Judgement*, para 63.

<sup>1040</sup> *Blaškić Appeals Judgement*, para 48. See also *Simić Trial Judgement*, para 162; *Kvočka Trial Judgement*, para 256.

<sup>1041</sup> *Blaškić Appeals Judgement*, para 48.

<sup>1042</sup> *Tadić Appeals Judgement*, para 229: “The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime ... and this support has a substantial effect upon the perpetration of the crime.” [emphasis added]; *Vasiljević Appeal Judgement*, para 102; *Blaškić Appeal Judgement*, para 45.

<sup>1043</sup> *Blaškić Appeals Judgement*, para 47. See also *Krnojelac Trial Judgement*, para 88, *Kunarac Trial Judgement*, para 393.

<sup>1044</sup> *Blaškić Trial Judgement*, para 284; *Aleksovski Trial Judgement*, para 65; *Furundžija Trial Judgement*, para 274

<sup>1045</sup> *Vasiljević Trial Judgement*, para 70.

<sup>1046</sup> *Simić Trial Judgement*, para 162.

<sup>1047</sup> *Tadić Appeals Judgement*, para 229; *Aleksovski Appeals Judgement*, para 162, referring to the *Furundžija Judgement*, para 249. *Blaškić Appeals Judgement*, para 49.

need not have been explicitly expressed, but it may be inferred from all relevant circumstances.<sup>1048</sup> While the aider and abettor need not share the *mens rea* of the principal, he must be aware of the essential elements of the crime ultimately committed by the principal.<sup>1049</sup> It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and one of these crimes was in fact committed.<sup>1050</sup>

## 2. Findings

351. The Indictment alleges that on 6 December 1991, the Accused aided and abetted the unlawful shelling of the Old Town of Dubrovnik conducted by forces under his command, including forces under the command of Captain Kovačević, which were directly subordinated to the 9 VPS commanded by Admiral Jokić.<sup>1051</sup>

352. The Prosecution submits that the Accused's acts or omissions on 6 December 1991 "not only give rise to Article 7(3) responsibility under the Statute but were so egregious as to constitute aiding and abetting under Article 7(1)." It refers in particular to the Accused's failure to intervene on the morning of 6 December 1991 and his subsequent efforts to enable his subordinates to avoid punishment for their offences.<sup>1052</sup>

353. The Defence submits that there is no evidence showing that the Accused lent any support to the commission of the alleged crimes as his acts and omissions were for the most part geographically and temporally removed from the crimes and had no decisive effect on them. Furthermore, the Defence submits that no evidence was adduced that shows that the Accused knew that the crimes were to be committed and that he was aware that his acts were assisting the principal offenders.<sup>1053</sup> There were further submissions but these depended on factual bases which the Chamber has not accepted.

354. As discussed earlier, the Chamber has found that on 5 December 1991 the Accused ordered forces under his command to take Srd.<sup>1054</sup> The Chamber also found that the deliberate and unlawful shelling of the Old Town that occurred on 6 December was not implied in the Accused's

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<sup>1048</sup> Čelebići Trial Judgement, para 328; Tadić Trial Judgement, 676.

<sup>1049</sup> Aleksovski Appeals Judgement, para 162.

<sup>1050</sup> Blaškić Appeals Judgement, para 50. See also Naletilić Trial Judgement, para 63; Kvočka Trial Judgement, para 255.

<sup>1051</sup> Indictment, para 15.

<sup>1052</sup> Prosecution Final Brief, para 278.

<sup>1053</sup> Defence Final Brief, para 596.

<sup>1054</sup> See *supra*, para 167.

order.<sup>1055</sup> In the Chamber's view, therefore, the Accused's order to attack Srđ did not have a substantial effect on preparations for the crimes charged in the Indictment and does not constitute an *actus reus* for engaging his responsibility for aiding and abetting under Article 7(1) of the Statute.

355. Turning to the Accused's actions on 6 December 1991, the Chamber notes that, as found elsewhere in this decision, as of about 0700 hours that day the Accused was on notice of the risk that forces under his command were committing offences such as those charged.<sup>1056</sup> While the evidence does not suggest that the Accused took all necessary and reasonable measures to ensure effectively that the unlawful attack on the Old Town ceased, neither does the evidence suggest that the Accused remained entirely inactive. In particular the Accused issued a general ceasefire order to take effect at 1115 hours.<sup>1057</sup> While the evidence does not suggest that this order was communicated to all forces involved in the attack on 6 December, or that it proved adequate to ensure an effective ceasefire,<sup>1058</sup> it remains the case that the Accused issued such order. While, as found later in this decision, the Accused did not initiate or ensure that his subordinates initiated an effective investigation into the events of 6 December and did not take steps towards the discipline and the punishment of the perpetrators,<sup>1059</sup> the Chamber is not satisfied that conduct of this nature, well after the offences were committed, could have a direct and substantial effect on the commission of the offences. In view of the fact that the Accused made an effort, albeit ineffective, to stop the firing, and in the absence of more settled jurisprudence as to whether, and if so in what circumstances, an omission may constitute the *actus reus* of aiding and abetting, in circumstances such as the present, it is the view of the Chamber that the Accused's failure to take more effective measures to stop the unlawful shelling of the Old Town is more properly regarded in the context of the Accused's responsibility as a superior under Article 7(3) of the Statute. Further, the evidence does not satisfy the Chamber that the required intent has been established.

### 3. Conclusion

356. In view of the above, the Chamber finds that it has not been established that the Accused is responsible under Article 7(1) of the Statute for aiding and abetting the unlawful shelling on the Old Town of Dubrovnik on 6 December 1991.

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<sup>1055</sup> See *supra*, paras 338-347.

<sup>1056</sup> See *infra*, para 418.

<sup>1057</sup> Exhibit P23.

<sup>1058</sup> See *infra*, paras 428-429.

<sup>1059</sup> See *infra*, para 444.

## C. Command responsibility

### 1. Law

357. Article 7(3) of the Statute reads:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The principle of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates is an established principle of international customary law,<sup>1060</sup> applicable to both international and internal armed conflicts.<sup>1061</sup>

358. It has been established that the following three elements need to be satisfied in order to invoke individual criminal responsibility under Article 7(3):

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>1062</sup>

#### (a) Superior-subordinate relationship

359. The superior-subordinate relationship lies in the very heart of the doctrine of a commander's liability for the crimes of his subordinates. It is the position of command over the perpetrator which forms the legal basis for the superior's duty to act, and for his corollary liability for a failure to do so.<sup>1063</sup> Indeed, as was held in previous jurisprudence, the doctrine of command responsibility is "ultimately predicated upon the power of the superior to control the acts of his subordinates".<sup>1064</sup>

360. The existence of such a position of command derives in essence from the "actual possession or non-possession of powers of control over the actions of subordinates."<sup>1065</sup> In determining the

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<sup>1060</sup> *Čelebići* Appeals Judgement, para 195; *Čelebići* Trial Judgement, para 343.

<sup>1061</sup> For application of the principle of command responsibility to internal armed conflicts, see *Prosecutor v Hadžihasanović et al.*, Case No IT-01-47-AR72, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para 31.

<sup>1062</sup> *Čelebići* Trial Judgement, para 346. See also *Kordić* Trial Judgement, para 401; *Blaškić* Trial Judgement, para 294; *Kovčka* Trial Judgement, para 314.

<sup>1063</sup> *Aleksovski* Appeals Judgement, para 76. See also ICRC Commentary on the Additional Protocols, which states that "responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so.", p 1010. See also the ILC commentary on the 1996 Draft Code of Crimes Against The Peace and Security of Mankind, Report of the International Law Commission on the work of its 48<sup>th</sup> session, UN doc.A/51/10, p. 36.

<sup>1064</sup> *Čelebići* Trial Judgement, para 377.

<sup>1065</sup> *Čelebići* Trial Judgement, para 370.

degree of control to be exercised by the superior over the subordinate, the Appeals Chamber endorsed the effective control standard<sup>1066</sup> and held that

The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior -subordinate relationship for the purpose of Article 7(3) of the Statute.<sup>1067</sup>

361. In the present case, the issue is raised whether a commander may be found responsible for the crime committed by a subordinate two levels down in the chain of command.<sup>1068</sup>

362. It appears from the jurisprudence that the concepts of command and subordination are relatively broad. Command does not arise solely from the superior's formal or *de jure* status,<sup>1069</sup> but can also be "based on the existence of *de facto* powers of control".<sup>1070</sup> In this respect, the necessity to establish the existence of a superior-subordinate relationship does "not [...] import a requirement of *direct* or *formal* subordination".<sup>1071</sup> Likewise, there is no requirement that the relationship between the superior and the subordinate be permanent in nature.<sup>1072</sup> The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination.<sup>1073</sup>

363. Consistently with the above reasoning, other persuasive sources seem to indicate that there is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate be immediately answerable to that superior or more remotely under his command. The Chamber refers to the ICRC Commentary dealing with the concept of a "superior" within the meaning of Article 86 of Additional Protocol I, the provision on which Article 7(3) of the Statute is based, which emphasises

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<sup>1066</sup> The Appeals Chamber endorsed the finding of the Trial Chamber that "it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences", *Čelebići* Trial Judgement, para 378.

<sup>1067</sup> *Čelebići* Appeals Judgement, para 256. In this respect, factors indicative of an accused's position of authority and how means of effective control may be demonstrated may include the official position held by the accused, his capacity to sign orders, whether *de jure* or *de facto*, the procedure for appointment, the position of the accused within the military or political structure and the actual tasks that he performed. See *Kordić* Trial Judgement, paras 418-424. The Appeals Chamber has rejected the argument that a superior may be held criminally liable on the basis of his powers of influence as it held that "substantial influence as a means of control in any sense which falls short of possession of effective control over subordinates" (*i.e.* possession of material ability to prevent or to punish) has no standing of rule of customary law, especially such that may trigger criminal liability. See *Čelebići* Appeals Judgement, para 266.

<sup>1068</sup> See *infra*, para 391.

<sup>1069</sup> *Čelebići* Appeals Judgement, para 193.

<sup>1070</sup> *Čelebići* Appeals Judgement, para 195.

<sup>1071</sup> *Čelebići* Appeals Judgement, para 303.

<sup>1072</sup> As stated in the ICRC Commentary in relation to Article 87 of Additional Protocol I dealing with the duty of commanders, "[a] commander may, for a particular operation and for a limited period of time, be supplied with reinforcements consisting of troops who are not normally under his command. He must ensure that these members of the armed forces comply with the Conventions and the Protocol as long as they remain under his command." See ICRC Commentary on the Additional Protocols, p 1019.

that the term does not only cover immediate superiors. Again, the issue is seen as one of control rather than formal direct subordination. It states

This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act [...] Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However, it should not be concluded from this that this position only concerns the commander under whose direct orders the subordinate is placed [...] The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.”<sup>1074</sup>

364. Further support can be found in the judgement of the military tribunal in the case against the Japanese Admiral Soemu Toyoda tried in the aftermath of World War II. The military tribunal expressly stressed the irrelevance of the level of subordination as it stated

In the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, *immediate or otherwise*, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.<sup>1075</sup>

365. Reference may also be made to the Commentary of the International Law Commission on Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind construing the use of the term “superiors” in the plural form as an indication that the doctrine of command responsibility “applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met.”<sup>1076</sup> In this respect, the Chamber also recalls that “the test of effective control ... implies

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<sup>1073</sup> *Kunarac Trial Judgement*, para 399.

<sup>1074</sup> ICRC Commentary on the Additional Protocols, p 1013. The Military Tribunal hearing the *High Command Case* similarly held that “[c]riminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.” *United States. v. Wilhelm von Leeb et al.*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. XI, pp 543-544.

<sup>1075</sup> *United States v. Soemu Toyoda*, Official Transcript of the Record of Trial, p 5006 (emphasis added). In this respect, the Trial Chamber further refers to the following finding of the Military Tribunal in the *Hostage Case* in relation to the defendant Dehner: “The defendant excuses his indifference to all these killings by saying that it was the responsibility of the division commanders. We agree that the divisional commanders are responsible for ordering the commission of criminal acts. But the superior commander is *also* responsible if he orders, permits, or acquiesces in such criminal conduct. His duty and obligation is to prevent acts, or if they have been already executed, to take steps to prevent their recurrence.” *United States v. Wilhelm List et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. XI, p 1298.

<sup>1076</sup> Report of the International Law Commission on the work on its forty-eight session, 6 May-26 July 1996, UN doc. A/51/10, p 37.

that more than one person may be held responsible for the same crime committed by a subordinate.”<sup>1077</sup>

366. In light of the above, the Chamber holds that there is no legal requirement that the superior-subordinate relationship be a direct or immediate one for a superior to be found liable for a crime committed by a subordinate, provided that the former had effective control over the acts of the latter. As to whether the superior has the requisite level of control, the Chamber considers that this is a matter which must be determined on the basis of the evidence presented in each case.

(b) Mental element: the superior knew or had reason to know

367. A superior may be held responsible under Article 7(3) of the Statute for crimes committed by a subordinate if, *inter alia*, he knew or had reason to know that the subordinate was about to commit or had committed such crimes.

368. A superior’s actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, but it may be established by circumstantial evidence.<sup>1078</sup> Factors that may be considered in this respect include the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time.<sup>1079</sup>

369. The jurisprudence of the Tribunal has considered the issue of when a superior “had reason to know.” As held by the Čelebić Trial Chamber, a superior can be held criminally responsible only if specific information was in fact available to him which would provide notice of offences committed by his subordinates,<sup>1080</sup> or of offences about to be committed. A superior is not liable for failing to acquire such information in the first place.<sup>1081</sup> The mental element of “reason to know” is determined only by reference to the information in fact available to the superior. However the information in fact available to him need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes.<sup>1082</sup> It is sufficient that the superior was put on

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<sup>1077</sup> Blaškić Trial Judgement, para 303, referring to Aleksovski Trial Judgement, para 106.

<sup>1078</sup> Čelebić Trial Judgement, para 386.

<sup>1079</sup> Čelebić Trial Judgement, para 386. See also Kordić Trial Judgement, para 427 and Blaškić Trial Judgement, para 307.

<sup>1080</sup> Čelebić Trial Judgement, para 393.

<sup>1081</sup> Blaškić Appeals Judgement, para 62, Čelebić Appeals Judgement, para 226.

<sup>1082</sup> Čelebić Trial Judgement, para 393.

further inquiry by the information, *i.e.* that it indicated the need for additional investigation in order to ascertain whether offences were being committed or were about to be committed.<sup>1083</sup>

370. The Appeals Chamber upheld this approach and held that a superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates,<sup>1084</sup> or about to be committed. It was further observed that even general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient.<sup>1085</sup> A superior may be regarded as having “reason to know” if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, *i.e.*, if the information available is sufficient to justify further inquiry.<sup>1086</sup>

371. This Chamber will approach its decision on the basis on this jurisprudence.

(c) Necessary and reasonable measures

372. The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior’s position of power. As the Tribunal’s definition of a “superior” requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.<sup>1087</sup>

373. Article 7(3) does not provide a superior with two alternative options, but contains two distinct legal obligations to prevent the commission of the offence and to punish the perpetrators.<sup>1088</sup> The duty to prevent arises for a superior from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed, while the duty to punish arises after the commission of the crime.<sup>1089</sup> Therefore, if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards.

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<sup>1083</sup> *Čelebić* Trial Judgement, para 393; *Kordić* Trial Judgement, para 437.

<sup>1084</sup> *Čelebić* Appeals Judgement, para 241; *Blaškić* Appeals Judgement, para 62.

<sup>1085</sup> *Čelebić* Appeals Judgement, para 238.

<sup>1086</sup> *Kordić* Trial Judgement, para 437.

<sup>1087</sup> *Čelebić* Trial Judgement, para 395 (footnotes omitted). See also *Kordić* Trial Judgement, para 443.

<sup>1088</sup> *Blaškić* Appeals Judgement, para 83.

<sup>1089</sup> *Blaškić* Appeals Judgement, para 83; *Kordić* Trial Judgement, paras 445-446.

374. What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation. In establishing individual responsibility of superiors, military tribunals set up in the aftermath of World War II have considered factors such as the superior's failure to secure reports that military actions have been carried out in accordance with international law,<sup>1090</sup> the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war,<sup>1091</sup> the failure to protest against or to criticize criminal action,<sup>1092</sup> the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command,<sup>1093</sup> and the failure to insist before a superior authority that immediate action be taken.<sup>1094</sup> The International Military Tribunal for the Far East has held that a superior's duty may not be discharged by the issuance of routine orders and that more active steps may be required:

The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders... His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out.<sup>1095</sup>

375. A superior's duty to prevent the commission of a crime is explicitly provided for by post World War II treaties. Additional Protocol I requires any commander who is aware that his subordinates are about to commit a crime "to initiate such steps as are necessary to prevent such violations."<sup>1096</sup> The ICRC commentary to the above text notes that this duty varies for each level of command, and by way of example, may imply that "a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander must ensure that an attack is

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<sup>1090</sup> *Hostages Case*, 11 TWC 759, p 1290. The defendant Rendulic was held responsible for acts of his subordinates for reprisals against the population, in the light of, *inter alia*, the fact that he made no attempt to secure additional information (after receiving reports indicating that crimes have been committed). Similarly, in holding the defendant Dehner responsible, the military tribunal considered the fact that the defendant made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with international law. p 1298; 1271.

<sup>1091</sup> *Hostages Case*, 11 TWC 759, p 1311. With respect to the responsibility of the defendant Lanz for reprisal carried out by his subordinates the military tribunal held: "This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war... As commander of eth XXII Corps it was his duty to act and when he failed to do so and permitted these inhumane and unlawful killings to continue, he is criminally responsible." p 1311.

<sup>1092</sup> *High Command Case*, 11 TWC 1, p 623. In finding the defendant Hans von Salmuth responsible, the military tribunal held *inter alia* that "it appears that in none of the documents or the testimony herein that the defendant in anyway protested against or criticized the action of the SD or requested their removal or punishment." (emphasis added). Similarly, in the *Hostage Case* the military tribunal found the defendant Wilhelm List responsible *inter alia* in the light of the fact that "[n]ot once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts." *Hostage Case*, 11 TWC 759, p 1272.

<sup>1093</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 452. The International Military Tribunal for the Far East held with respect to the defendant Kimura that "[h]e took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command."

<sup>1094</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 448. The Tokyo judgment found that the defendant Hirota "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented..."

<sup>1095</sup> The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 452.

<sup>1096</sup> Additional Protocol I, Article 87(3).

interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks.”<sup>1097</sup>

376. A superior’s duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.<sup>1098</sup> Military tribunals established after World War II have interpreted the superiors’ duty to punish as implying an obligation for the superiors to conduct an effective investigation<sup>1099</sup> and to take active steps to secure that the perpetrators will be brought to justice.<sup>1100</sup> Relevant in this respect could also be whether the superior has called for a report on the incident and the thoroughness of the investigation.<sup>1101</sup>

377. Further guidance as to what the duty to punish may entail is provided by Additional Protocol I. Article 87(3) of AP I requires a commander who is aware that his subordinates have committed a breach of the Geneva Conventions or the Protocol “... where appropriate to initiate disciplinary or penal action” against them. The ICRC commentary suggests that this action may include informing their superior officers of the situation, “drawing up a report in the case of a breach, [...] proposing a sanction to a superior as disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence which is possible to find.”<sup>1102</sup>

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<sup>1097</sup> ICRC Commentary on the Additional Protocols, paras 3560-3561, p 1022.

<sup>1098</sup> *Kordić Trial Judgement*, para 446.

<sup>1099</sup> The Trial of General Tomoyuki Yamashita, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume IV, p 35: “...where murder and rape and vicious, revengeful actions are widespread offences and there is *no effective attempt* by a commander to discover and control the criminal acts, such commander may be held responsible, even criminally liable, for the lawless acts of his troops...” (emphasis added) See also The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 458. The Tokyo judgment found that the defendant Shigemitsu “took *no adequate steps* to have the matter investigated... He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.” The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 458 (emphasis added).

<sup>1100</sup> *High Command Case*, p 623: When assessing Hans von Salmuth’s responsibility for actions by his subordinates, the military tribunal considered the fact that the only punishment inflicted was a 20-day confinement sentence against a member of his own staff for unauthorized participation in this action. *High Command Case*, p 623. In the Hostage Case, the military tribunal considered the defendant’s commitment to conduct an adequate investigation and to bring the perpetrators to justice: “The investigation was made, the battle report of the commanding officer was found to be false, and the action of the regimental commander found to be in excess of existing orders. Upon the discovery of these facts the defendant Felmy recommended that disciplinary action be taken against the officer in charge in consideration of the sacrifices of the regiment in the combat area at the time. The defendant testified that he never knew what punishment, if any was assessed against this guilty officer. He seems to have had no interest in bringing the guilty officer to justice.” *Hostage Case*, p 1309.

<sup>1101</sup> The International Military Tribunal for the Far East found the defendant Tojo responsible for not taking adequate steps “to punish the offenders and to prevent the commission of similar offences in the future. ... He did not call for a report on the incident. ... He made perfunctory inquiries about the march but took no action. No one was punished.” The Tokyo Judgment, The International Military Tribunal for the Far East, Volume I, p 462.

<sup>1102</sup> ICRC Commentary on the Additional Protocols, para 3562, p 1023.

378. In view of the above the question whether all necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators have been taken should be considered in light of the Accused's material powers at that time. Factors relevant to the Chamber's assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.

## 2. Findings

### (a) Superior-subordinate relationship

#### (i) Command structure

379. The 2 OG was formed in mid September 1991<sup>1103</sup> by the General Staff of the JNA.<sup>1104</sup> It was a temporary formation at the level of an army<sup>1105</sup> and was in existence well into 1992.<sup>1106</sup> Its geographic area of responsibility included the territory from the Bay of Kotor in the south, to Neretva River in the north<sup>1107</sup> and to Mostar in the territory of current day Bosnia and Herzegovina,<sup>1108</sup> thus encompassing the city and surroundings of Dubrovnik. Its headquarters were initially located in Kifino Selo,<sup>1109</sup> but in October 1991 were relocated to the town of Trebinje in Bosnia and Herzegovina.<sup>1110</sup>

380. In September 1991 the commander of the 2 OG was General Jevrem Cokić.<sup>1111</sup> In late September or early October 1991 he was replaced by General Ruzinovski.<sup>1112</sup> On 12 October 1991

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<sup>1103</sup> Admiral Jokić, T 3822; 4586.

<sup>1104</sup> Milovan Zorc, T 6564; Exhibit P204, p 26.

<sup>1105</sup> Admiral Jokić, T 3822; 4418; 4586.

<sup>1106</sup> Colonel Jovanović, T 7040-7041. Admiral Jokić testified that the 2 OG commanded all units involved in the Dubrovnik operation through May 1992 (Admiral Jokić T 4995).

<sup>1107</sup> Admiral Jokić testified that the area of responsibility of the 2 OG included ran to Neretva River, T 4418. Adrien Stringer however believed that it extended to Slano in the north, T 316.

<sup>1108</sup> Adrien Stringer testified that at a meeting held on 11 October 1991, General Ruzinovski, who spoke as the commander of the 2 OG outlined the area of command of the 2 OG as running from the Bay of Kotor in the south to Slano in the north and to Mostar in Bosnia and Herzegovina, T 316. *See also* Admiral Jokić, T 4418; Milovan Zorc, T 6565.

<sup>1109</sup> Admiral Jokić, T 3823.

<sup>1110</sup> Admiral Jokić, T 3860-3861; *See also* Exhibit P115, a letter of 7 November 1991 addressed to the Headquarters of the 2 OG in Trebinje; On 6 December 1991 Colm Doyle met with the Accused in the command post of the 2 OG in Trebinje, T 1708-1710.

<sup>1111</sup> Colonel Svičević, T 7057-7058; Exhibit D44, a document dated 29 September 1991 and signed by General Cokić, the commander of the 2 OG; Captain Nešić, T 8200.

<sup>1112</sup> Admiral Jokić, T 3824; *See also* Adrien Stringer, T 311; 315. At a meeting held on 11 October 1991 General Ruzinovski spoke as a commander of the 2 OG. Colonel Svičević, T 7058.

the Accused assumed command of the 2 OG<sup>1113</sup> and remained the commander of the 2 OG well into 1992.<sup>1114</sup>

381. On 7 October 1991 the 2 OG consisted of the following five units: 37 Corps (the Uzice Corps) under the command of General Milan Torbica; 2 Corps (the Podgorica Corps) under the command of General Dragutin Eremija; 9 VPS (Boka), which on 7 October was under the acting command of Warship-Captain Zec, until Admiral Jokić took over the following day; 472 mtbr (Trebinje Brigade), under the command of Colonel Obrad Vicić, and the newly established 2 Tactical Group active in the region of Konavle, under the command of General Branko Stanković. The commanders of these units were directly subordinated to the Accused.<sup>1115</sup>

382. In October and November 1991 some changes to the command structure of the 2 OG were introduced. As of 21 October 1991 the 2 Tactical Group was disbanded and its units were re-subordinated to other establishments.<sup>1116</sup> As a result, the 3/5 mtbr from Podgorica, initially part of the 2 Tactical Group, was re-subordinated to the 9 VPS and remained under the command of the 9 VPS until at least 31 December 1991.<sup>1117</sup>

383. Changes were also made with respect to the 472 mtbr. On 25 October 1991 by an order issued by the Accused, the 472 mtbr was removed from direct subordination to the 2 OG and was re-subordinated to the 9 VPS.<sup>1118</sup> On 20 November 1991 by an order of Admiral Jokić issued pursuant to a decision of the 2 OG, the 472 mtbr, except for its 3<sup>rd</sup> Battalion (3/472 mtbr), left the composition of the 9 VPS and was subordinated to the 2 Corps. The 3/472 mtbr remained directly subordinated to the 9 VPS for the remainder of 1991 and well into 1992.<sup>1119</sup>

384. As a result of these changes to the command structure of the 2 OG, on 6 December 1991 the 2 OG consisted of the following three units: the 37 Corps, the 2 Corps, and the 9 VPS.<sup>1120</sup>

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<sup>1113</sup> Exhibit P135; Admiral Jokić, T 3824; Adrien Stringer, T 339. At a meeting between the ECMM and the JNA held on 14 October 1991 the JNA liaison officer announced that he would refer the discussed matter to the Accused, the new Commanding General, Adrien Stringer, T 339.

<sup>1114</sup> Admiral Jokić, T 3831; Per Hvalkof, T 2301-2302; On 6 December 1991 the Accused was the senior JNA commander in the area, Colm Doyle, T 1724. See also Colm Doyle, Meeting in February 1992 with the head of the monitoring mission, Ambassador Salgueiro, Colm Doyle, T 1724.

<sup>1115</sup> Admiral Jokić, T 3826-3827; Exhibit P99. Per Hvalkof testified that the ECMM operational staff prepared organisational charts of the JNA command structure in the respective areas. (T 2215-2216) Based on that information the Accused was the commander of the JNA forces in the region for the entire time between October and December 1991, Per Hvalkov, T 2216-2217.

<sup>1116</sup> Admiral Jokić, T 3862; 4502.

<sup>1117</sup> Admiral Jokić, T 3845; 3847; 4593; Exhibit P100. See also Lieutenant-Colonel Jovanović, T 8072.

<sup>1118</sup> Exhibit D43; Admiral Jokić, T 3837; 3954; 4401-4403; Milovan Zorc, T 6691-6692; Lieutenant-Colonel Pavičić, T 6923-6925.

<sup>1119</sup> Exhibit P101; Admiral Jokić, T 3834-3835; 4494; 4595; Milovan Zorc, T 6604-6605; Lieutenant-Colonel Pavičić, T 6895; 6930.

<sup>1120</sup> Admiral Jokić, T 3831; Exhibit P100; Milovan Zorc, T 6550; 6688-6689.

385. The 9 VPS included the following units: the 3/5 mtbr, the 3/472 mtbr, the 3 Light Brigade, the Trebinje Territorial Defence branch and corresponding battalion, some territorial units, and the 107 Coastal Artillery Group (OAG).<sup>1121</sup> Initially, the 9 VPS headquarters were located in Kumbor, Montenegro.<sup>1122</sup> Subsequently, a forward command post was set up in Kupari, near Dubrovnik.<sup>1123</sup> The commander of the 9 VPS was Admiral Jokić.<sup>1124</sup>

386. The 3/472 mtbr numbered approximately 700 troops. It consisted of four companies; three infantry companies each of which had 82mm mortars, and an anti-tank company.<sup>1125</sup> It also had a 120 mm mortar battery.<sup>1126</sup> From late October 1991 and throughout the remainder of 1991 and well into 1992 the 3/472 mtbr was under the command of Captain Kovačević, also known as "Rambo."<sup>1127</sup>

387. The 3/5 mtbr had a composition similar to that of the 3/472 mtbr. In addition it had a company of armoured carriers.<sup>1128</sup> The commander of the 3/5mtbr was Major Srboljub Zdravković<sup>1129</sup> who, on 5 December 1991, was granted leave and was temporarily replaced by Lieutenant-Colonel Jovanović, the Brigade's Chief of Staff.<sup>1130</sup> On 5 and 6 December 1991 Lieutenant-Colonel Jovanović was in temporary command of that unit,<sup>1131</sup> but was summarily relieved of that command on the order of Admiral Jokić on the evening of 6 December 1991, *i.e.* effectively he acted as commander of the 3/5 mtbr only for the time the attack was planned and implemented.<sup>1132</sup>

388. The 3<sup>rd</sup> Light Brigade consisted of 1200 to 1300 men and had weak artillery. It was used for auxiliary tasks and for control of territories. The Trebinje Territorial Defence branch and the corresponding battalions did not participate in combat operations.<sup>1133</sup>

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<sup>1121</sup> Admiral Jokić, T 3831-3832; Exhibit P100; Exhibit D46. The units indicated on Exhibit P100 are ground units only; the complete structure of the 9 VPS included also a number of naval forces and is indicated in Exhibit D46. See also Admiral Jokić, T 4485-4493. See also Milovan Zorc, T 6559 with respect to the 3/472 mtbr. With respect to 107 OAG see Captain Pepić, T 7473-7475.

<sup>1122</sup> Admiral Jokić, T 3859. See also Frigate-Captain Handžijev, T 7587.

<sup>1123</sup> Admiral Jokić, T 3859.

<sup>1124</sup> Admiral Jokić, T 3824; See also Exhibit P204, p 19.

<sup>1125</sup> Admiral Jokić, T 3836.

<sup>1126</sup> Admiral Jokić, T 3845.

<sup>1127</sup> Admiral Jokić, T 4095-4096; Lieutenant Lemal, T 7346. Lieutenant-Colonel Stojanović testified that Captain Kovačević became the commander of the 3<sup>rd</sup> Battalion on 21 October 1991, T 7796. With respect to Captain Kovačević remaining in office until at least the end of December 1991, see Admiral Jokić, T 4119; 3833; 4130 and Exhibit P133.

<sup>1128</sup> Admiral Jokić, T 3846.

<sup>1129</sup> Admiral Jokić, T 3845, Exhibit P100.

<sup>1130</sup> Lieutenant-Colonel Jovanović, T 8075; 8071-8072; 8077; Admiral Jokić, T 8551-8552.

<sup>1131</sup> Admiral Jokić, T 4103-4104; Lieutenant-Colonel Jovanović, T 8082.

<sup>1132</sup> Colonel Jovanović, T 8093-8094; Admiral Jokić, T 8553.

<sup>1133</sup> Admiral Jokić, T 3846-3847.

389. The 107 OAG had five batteries, including one 85mm howitzer and one 130mm howitzer battery.<sup>1134</sup> From the end of October 1991 to early 1992, the 130mm battery and the 85mm battery were located at Čilipi airport.<sup>1135</sup> The commander of the 107 OAG was Lieutenant-Colonel Stamenov.<sup>1136</sup>

390. Some Defence witnesses suggested that the 9 VPS was within the Military Naval District (VPO) and that their superior military command was the command of the VPO, as might be suggested by some orders the 9 VPS received from the VPO.<sup>1137</sup> Indeed, in peacetime the 9 VPS was a regular component of the VPO. However, in the period from October 1991 and well into 1992 the 9 VPS was part of 2 OG and received its combat assignments from the command of the 2 OG.<sup>1138</sup> During that period the 9 VPS was no longer under VPO operational control.<sup>1139</sup> The VPO may have continued to have some limited connection principally of an administrative character with the 9 VPS in naval matters, but in the Chamber's finding the evidence establishes that this did not detract from the place of the 9 VPS as a part of the 2 OG.<sup>1140</sup>

391. In view of the above, the Chamber is satisfied that on 6 December 1991 the 3/472 mtbr, the 3/5 mtbr, and the 107 OAG, among other units, were directly subordinated to the 9 VPS, which was subordinated to the 2 OG. The 3/472 mtbr, the 3/5 mtbr and the 107 OAG were at the second level of subordination to the 2 OG. The Chamber is satisfied, therefore, and finds that the Accused, as the commander of the 2 OG, had *de jure* authority over the JNA forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town.

#### (ii) Effective control

392. As discussed above, the indicators of effective control depend on the specific circumstances of the case.<sup>1141</sup> The Chamber turns now to consider whether the evidence in the case establishes that the Accused had the power to prevent the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991, and punish or initiate disciplinary or other adverse administrative proceedings against the perpetrators.

<sup>1134</sup> Captain Pepić, T 7473-7474; Admiral Jokić, T 4398.

<sup>1135</sup> Captain Pepić, T 7474-7475.

<sup>1136</sup> Captain Pepić, T 7474.

<sup>1137</sup> Captain Drljan, T 7685. Captain Drljan referred to an order that he received on 27 September 1991 from Captain Krstić or Krsto Djurović, the sector commander, to pull out three patrol boats from Pula, T 7685. See also Exhibit D105, an order issued by Admiral Jokić, the commander of the 9 VPS on the basis of orders from the VPO.

<sup>1138</sup> Milovan Zorc, T 6661-6663.

<sup>1139</sup> Exhibit P199, an order dated 20 September 1991 from the command of the VPO which does not include the 9 VPS as a unit operationally subordinated to the VPO and does not issue any assignments to the 9 VPS. See also Exhibit P204, pp 19-20.

<sup>1140</sup> See *infra*, para 404.

<sup>1141</sup> Blaškić Appeals Judgement, para 69.

a. Did the Accused have the material ability to prevent the attack on the Old Town of 6 December 1991?

393. At the outset the Chamber notes that while the 2 OG was a newly established unit, it had the fundamental organisational structure to enable it to control combat operations.<sup>1142</sup> It received regular combat reports from the units directly subordinated to it, the 9 VPS, the 2<sup>nd</sup> Corps and the 37<sup>th</sup> Corps, which were compiled on the basis of reports from their subordinate units down to the level of battalion.<sup>1143</sup> All principles of command and control for the armed forces applied to the 2 OG.<sup>1144</sup>

394. The command of the 2 OG conducted combat activities through the corps, VPS and the brigade commands.<sup>1145</sup> Commanders of units directly subordinated to the 2 OG issued orders to their subordinate units pursuant to orders from the command of the 2 OG.<sup>1146</sup> Admiral Jokić, the commander of the 9 VPS, received orders from the command of the 2 OG<sup>1147</sup> and issued orders to his subordinate units, including the 3/472 mtbr, 3/5 mtbr and the 107 OAG, in accordance with these orders.<sup>1148</sup>

395. As the commander of the 2 OG, the Accused had the authority to give direct combat orders not only to the units under his immediate or first level command, but also to units under his command at a second or further lower level.<sup>1149</sup> By way of actual examples, an order of the command of the 2 OG of 24 October 1991 bearing the Accused's name, gave tactical instructions for conduct of combat operations to the units of the 2 OG, including the 9 VPS and the 472 mtbr.<sup>1150</sup> An order dated 23 October 1991 signed on behalf of the Accused assigned specific tasks to the 9 VPS and the 472 mtbr. By the same order, direct combat tasks were given to the 3/472 mtbr.<sup>1151</sup> These included an order to move the unit to a specific position.

396. The authority of the Accused to give direct combat orders included, of course, authority to order a unit to ceasefire and to prohibit explicitly attacks on particular targets. Examples are an order from the command of the 2 OG issued on 24 October 1991 under the name of the Accused to

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<sup>1142</sup> Admiral Jokić, T 3829-3830.

<sup>1143</sup> Admiral Jokić, T 3907-3909; 4519-4522; Exhibit P45; Exhibit P204, p 22.

<sup>1144</sup> Milovan Zore, T 6433.

<sup>1145</sup> Exhibit P204, pp 22-23.

<sup>1146</sup> Exhibit P204, pp 22-23; *See also* for example, Exhibit P122.

<sup>1147</sup> Admiral Jokić, T 3856-3858. Admiral Jokić testified that the operation referred to in Exhibit P126 was ordered by the command of the 2 OG, T 3992-3994.

<sup>1148</sup> Admiral Jokić, T 3856-3858; 3992-3995; 4329. The command of the 2 OG was informed of the orders issued by the command of the 9 VPS to its subordinate units. *See* for example, Exhibit P126; Exhibit P128.

<sup>1149</sup> Milovan Zore, T 6594; Exhibit P204, pp 22-23.

<sup>1150</sup> Exhibit P119; Admiral Jokić, T 3958-3959.

<sup>1151</sup> Exhibit P121; Lieutenant Lemal, T 7399-7402. Lieutenant Lemal confirmed that this order assigned specific tasks to his battalion, T 7399-7401.

the commands of the 2<sup>nd</sup> Corps, 37<sup>th</sup> Corps, 9 VPS, and 472 mtbr which “strictly” prohibited attacks on Dubrovnik.<sup>1152</sup> Another order from the command of the 2 OG to the 9 VPS signed by the Accused and dated 18 November 1991 contained an explicit order not to open fire on the Old Town of Dubrovnik and to retreat to cover units exposed to enemy fire.<sup>1153</sup>

397. The Accused had the power to order re-subordination of units within the structure of the 2 OG. The changes in the command structure of the 2 OG between 7 October and 6 December 1991 were effected by orders of the command of the 2 OG on proposals from subordinate units.<sup>1154</sup>

398. The nature and extent of the Accused’s material ability to prevent an attack on Dubrovnik by the JNA forces deployed in the region is further illustrated by his authority to represent the JNA in the negotiations with the ECMM and the Crisis Staff of Dubrovnik. Adrien Stringer testified that after the Accused assumed command of the 2 OG, it was solely the Accused as overall commander who made decisions in relations to ECMM requests.<sup>1155</sup> The Accused had the authority to sign on behalf of the JNA a proposal for normalisation of life in Dubrovnik addressed to the ECMM and the Crisis Staff of Dubrovnik, which included an undertaking by the JNA to guarantee an absolute ceasefire of all its units, and an undertaking to guarantee the security of the citizens and the cultural monuments of Dubrovnik.<sup>1156</sup> ECMM communications regarding location of the JNA lines or breaches of ceasefire were addressed to the Accused.<sup>1157</sup>

399. Some Defence witnesses, who in the autumn of 1991 served as company commanders of units subordinated to the 3/472 mtbr, testified that they received orders only from their superior commander, Captain Kovačević and that they knew that Captain Kovačević’s superior commander was the commander of the 9 VPS, Admiral Jokić. At their level they appear not to have been aware of any role of the 2 OG.<sup>1158</sup> This evidence is not surprising, especially as the 2 OG was a newly formed temporary structure. As discussed above, the 2 OG generally conducted combat operations via corps, VPS and brigade commands.<sup>1159</sup> According to the JNA principle of singleness of command, the command of a corps was the superior competent to issue orders to the corps. While

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<sup>1152</sup> Exhibit P119, para 3, and last sentence; Admiral Jokić, T 3932-3993.

<sup>1153</sup> Exhibit D47; *see also* Admiral Jokić, T 4551-4554.

<sup>1154</sup> Admiral Jokić, T 3848. The order for re-subordination of the 472 mtbr was issued pursuant to a decision of the command of the 2 OG (Exhibit P101). *See also* Exhibit D43.

<sup>1155</sup> Adrien Stringer, T 447.

<sup>1156</sup> Exhibit P22, point 7; Lars Brolund, T 855. *See also*, Admiral Jokić, T 3971-3974.

<sup>1157</sup> Per Hvalkof, T 2134; Exhibit P61, tab 8. The ECMM protested the shelling of Dubrovnik of 9 November 1991 and the restriction of the EC monitors’ freedom of movement by a letter addressed to the Accused. (Per Hvalkof, T. 2141-2142; Exhibit P61, tab 10) Further, during the shelling of 9-14 November 1991, the ECMM addressed the Accused with a request to stop the shelling. (Per Hvalkof, T 2168, Exhibit P61, tab 17; *see also* Per Hvalkof; T 2139, Exhibit P61, tab 9).

<sup>1158</sup> Lieutenant Lemal, T 7402-7403; Lieutenant-Colonel Stojanović, T 7834-7842. Lieutenant-Colonel Jovanović, the commander of the 3/5 mtbr testified that while carrying out his tasks he did not have any contact with the 2 OG, T 8077.

the superior officer had the authority to issue orders to the second or further lower level, this was not the usual practice.<sup>1160</sup> In practice it is to be expected that subordinates at the level of company commanders would receive orders from their immediate commanders and may not be aware pursuant to what authority these orders were issued. Therefore, this evidence is not inconsistent with the principles applied in the JNA, as revealed in the evidence, and does not have material relevance to the Accused's effective control of all units of the 2 OG.

400. The Defence places reliance on the circumstance that the command of the 9 VPS submitted two reports directly to the General Staff of the SFRY without informing the command of the 2 OG.<sup>1161</sup> It relies on the "Report on damage in old parts of Dubrovnik" signed by Admiral Jokić and addressed to the Deputy Federal Secretary for National Defence, Admiral Stane Brovet<sup>1162</sup> and on the "Action Report of 3/472 mtbr of 6 December 1991", signed by Admiral Jokić and addressed to the "First Administration" and General Simonović in particular.<sup>1163</sup> As has been noted elsewhere in this decision, when the very special circumstances which led to these two reports are considered, their existence does not evidence the normal command structure, or a break-down in the normal structure or affect the relevant powers and duties of the Accused.<sup>1164</sup>

401. The Defence also suggests that the frequent changes of the command of the 2 OG and the re-subordination of its units was a factor detracting from the effectiveness of the command system of the 2 OG.<sup>1165</sup> While frequent changes of command could be a negative factor for the command and control climate,<sup>1166</sup> the evidence does not indicate that these changes had any significant effect in practice on the effectiveness of the Accused's command of, and authority over, the 2 OG in the relevant period. Relevantly, 9 VPS acted pursuant to orders and decisions from the command of the 2 OG and complied with Accused's orders.<sup>1167</sup> The Chamber notes that, by a decree of the Yugoslav Presidency of 28 November 1991, the Accused was promoted to the rank of Lieutenant-General for *inter alia* successfully directing and commanding.<sup>1168</sup> This was an extraordinary promotion and is indicative of the Accused's ability to exercise effective control over the troops under his command.

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<sup>1159</sup> Exhibit P204, pp 22-23.

<sup>1160</sup> Milovan Zorc, T 6594; Exhibit P204, pp 22-23.

<sup>1161</sup> Defence Closing Brief, para 84 and following.

<sup>1162</sup> Exhibit P61, tab 39.

<sup>1163</sup> Exhibit D65.

<sup>1164</sup> See *supra*, paras 171-173.

<sup>1165</sup> Defence Closing Brief, paras 68-72.

<sup>1166</sup> Milovan Zorc, T 6682.

<sup>1167</sup> The order for re-subordination of the 472 mtbr was issued by the command of the 9 VPS pursuant to a decision from the command of the 2 OG (Exhibit P101). The order issued on 24 October 1991 by the command of the 9 VPS in order to improve the security was issued pursuant to an order from the 2 OG (Exhibit P122). See also Exhibit P109 and Exhibit P113.

<sup>1168</sup> Exhibit P134; Exhibit P135; Admiral Jokić, T 4122-4124.

402. As referred to above in the section on command structure, Defence evidence suggests that in the period from October to December 1991, the 9 VPS, which in peacetime was a regular component of the VPO, received and acted on orders from the VPO. Therefore, the question arises whether in the time material to this Indictment the VPO exercised effective control over the 9 VPS.

403. As established earlier,<sup>1169</sup> in the period from October 1991 until well into 1992 the 9 VPS was part of the 2 OG. The VPO retained certain authority with respect to areas such as organisation and establishment, troop replenishment, personnel administration for senior officers, logistics supplies and others.<sup>1170</sup> By an order of 24 October 1991, the command of 2 OG directed the 9 VPS to consider the need of strengthening of its battleships and accordingly to submit a request for such ships in due course to the command of the VPO.<sup>1171</sup> Two reports dealing with logistical matters were sent by the 9 VPS to the command of both the 2 OG and the VPO on 4 and 5 December 1991.<sup>1172</sup> This evidence suggests that in the period October to December 1991, the VPO had primarily an administrative role with respect to the 9 VPS.

404. As discussed in the preceding sections, the 9 VPS received its combat assignments from the command of the 2 OG.<sup>1173</sup> The VPO had no authority to influence the combat actions of the 9 VPS.<sup>1174</sup> Further, the command of the 2 OG retained responsibility for maintaining discipline, and for the promotion and removal of officers.<sup>1175</sup> The Chamber's conclusion from this evidence is that at the material time the VPO had no combat or operational authority over the 9 VPS and did not exercise effective control over 9 VPS units. The limited authority of the VPO in respect of 9 VPS is not shown to have diminished the effectiveness of the Accused's command of the 2 OG in respect of the events of, and relating to, the attack on 6 December 1991.

405. The Chamber is satisfied that the Accused, as the commander of the 2 OG, had the material ability to prevent the unlawful shelling of the Old Town on 6 December 1991 and to interrupt and stop that shelling at any time during which it continued.

b. Did the Accused have the material ability to punish the perpetrators?

406. In addition to his authority over all units of the 2 OG in operational matters, as the commander of the 2 OG the Accused's authority included authority to issue orders and instructions

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<sup>1169</sup> See *supra*, para 391.

<sup>1170</sup> Exhibit P204, p 20; Milovan Zorc, T 6661-6664.

<sup>1171</sup> Exhibit P119.

<sup>1172</sup> Exhibit D97; Exhibit D98.

<sup>1173</sup> See Milovan Zorc, T 6661-6663.

<sup>1174</sup> Milovan Zorc, T 6661-6664; see also Exhibit P204, p 20.

<sup>1175</sup> See *infra*, paras 411-413; see also Milovan Zorc, T 6705.

relating to discipline to the units of the 2 OG, including the 9 VPS. On 1 November 1991 the command of the 9 VPS issued an order governing life and work of units in combat,<sup>1176</sup> which among other measures, prohibited the unauthorized movement of soldiers from units and positions and required the commanders of subordinate units to ensure unconditional execution of orders and responsible execution of duties. This order was given on the basis of explicit orders from the 2 OG, following an incident that highlighted the need to improve combat security.<sup>1177</sup> The "Plan of Measures and Activities Aimed at Developing and Maintaining Order, Discipline and Morale of Units in the Next Period" issued by the command of the 9 VPS on 4 December 1991 was in line with orders issued by the 2 OG and was intended to eliminate existing problems with discipline.<sup>1178</sup> By an order of 22 January 1992, issued as an addendum to an order of the command of the 2 OG, the command of the 9 VPS further clarified the procedure for gathering of war booty, the misappropriation of which was considered a serious offence.<sup>1179</sup> While this was issued after 6 December 1991, it provides an illustration of the working of the command structure in the 2 OG and the complementary relationship of the role of the 9 VPS in such matters, a role which did not detract from the ultimate power and authority of the Accused as commander of the 2 OG.

407. The Accused also had authority to seek an increase of the number of military police. It is suggested in the evidence that the 2 OG did not have sufficient military police. It is noted that subordinate officers put forward a request for mobilization of additional military police to the Accused because he had the authority to seek reinforcements.<sup>1180</sup> Milovan Zorc testified to the rather obvious proposition that if a commander of an OG needed a greater number of military police, he should have requested them.<sup>1181</sup>

408. As the commander of the 2 OG, the Accused had authority to apply all disciplinary measures prescribed by law.<sup>1182</sup> If a criminal offence had been committed, commanding officers of all levels of units had an obligation to ensure that the information about the violation reached the prosecution authorities. If a lower level commander had not complied with this obligation, the superior commander leading the operation personally had the authority and the obligation to check whether the military police had been informed of the violation, and whether the military police had notified the prosecutor.<sup>1183</sup>

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<sup>1176</sup> Exhibit P109.

<sup>1177</sup> Admiral Jokić, T 3882-3884; Exhibit P109.

<sup>1178</sup> Admiral Jokić, T 4514-4515; Exhibit P110.

<sup>1179</sup> Exhibit P113; Admiral Jokić, T 3902-3904; T 4518-4519.

<sup>1180</sup> Admiral Jokić, T 3904-3906.

<sup>1181</sup> Milovan Zorc, T 6721-6722.

<sup>1182</sup> Exhibit P204, p 26.

<sup>1183</sup> Milovan Zorc, T 6510-6513. See also Exhibit P189, Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, item 36.

409. The Defence submits that at the material time the military courts in the region were not functioning.<sup>1184</sup> Indeed, the military court covering the area of Dubrovnik, which in peacetime was located in Split,<sup>1185</sup> was relocated to the Bay of Kotor in October 1991, and as a consequence, at least for a month was not functioning.<sup>1186</sup> The evidence does not suggest, however, that this was a material issue in October 1991 or thereafter. The unavailability of a military court did not exonerate a commander from his duty to ensure that information about an offence was communicated to the judicial authorities. According to the rules and practice of the JNA, if a military court was not available, the higher military court and the military prosecution should determine the court to be seized with the matter. If the higher court is also not available, the commander had the responsibility to refer the information further up the chain of command to the Federal Secretariat of National Defence.<sup>1187</sup> At the time material to this Indictment, in addition to the military court in Split, there were military courts in Ljubljana, Zagreb, Sarajevo, Belgrade, Niš and Skopje,<sup>1188</sup> so there was not a complete breakdown in the military court system.

410. Indeed, there were cases of criminal proceedings initiated against soldiers from the 2 OG. Veselin Simović, a reserve soldier of the 2 OG was indicted by the Military Prosecutor of Sarajevo for murdering 7 Croat civilians in the village of Kijev Do, Trebinje municipality.<sup>1189</sup> There were about 68 indictments filed with the military court in Tivat,<sup>1190</sup> many of which dealt with looting and arson, and about 150 criminal reports for robbery.<sup>1191</sup> There were, however, no indictments related to the shelling of the Old Town of Dubrovnik in October and November 1991, nor, as discussed elsewhere, to the shelling of 6 December 1991,<sup>1192</sup> or to other breaches of international humanitarian law.

411. According to the laws of the SFRY, in peacetime, the authority to appoint or to recall battalion commanders was reserved for the highest level of command, the Federal Secretary of National Defence.<sup>1193</sup> However, during combat operations the removal of an officer could be quickly effected through transfer and appointment to other duties as a personnel change resulting

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<sup>1184</sup> Defence Final Brief, para 74.

<sup>1185</sup> Milovan Zorc, T 6480; Admiral Jokić, T 4381.

<sup>1186</sup> Admiral Jokić, T 4382-4384.

<sup>1187</sup> Milovan Zorc, T 6480-6481.

<sup>1188</sup> Admiral Jokić, T 4381. *See also* Milovan Zorc, T 6479-6480.

<sup>1189</sup> Exhibit P111; *See also* Admiral Jokić, T 3900.

<sup>1190</sup> Admiral Jokić testified that at the end of October and the beginning of November 1991, the military court of Split was temporarily located in Tivat, T 4381.

<sup>1191</sup> Admiral Jokić, T 3900-3901.

<sup>1192</sup> *See infra*, paras 436-437.

<sup>1193</sup> Exhibit P204, p 28.

from “the needs of service.”<sup>1194</sup> These measures were in the power and capacity of the Accused as Commander of the 2 OG.

412. In addition, as the commander of the 2 OG, the Accused could also ensure the replacement of a subordinate commander during combat operations by recommending to the Federal Secretary of National Defence the removal of the officer supported by an explanation for his recommendation.<sup>1195</sup>

413. Similarly, as the commander of the 2 OG, the Accused had certain powers with respect to promoting officers under his command. A proposal for a promotion of an officer for successful performance of tasks, the so-called extraordinary promotion, had to be submitted to the Federal Secretary of National Defence through the chain of command, which, in the case of the promotion of Captain Kovačević for example, which occurred 8 days after 6 December 1991, would have required the Accused as commander of the 2 OG to approve and then to submit his recommendation to the Federal Secretary.<sup>1196</sup> A regular promotion, *i.e.* promotion for time served at certain rank, was decided by the Federal Secretary, but in this case, the commander of the 2 OG had the power to oppose it.<sup>1197</sup>

### (iii) Conclusion

414. In view of the above the Chamber is satisfied that as the commander of the 2 OG the Accused had effective control over the perpetrators of the unlawful attack on the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to issue orders to the 3/472 mtbr, and all the other JNA forces involved in the attack on Srd and the shelling of Dubrovnik, including the Old Town, explicitly prohibiting an attack on the Old Town, as well as to take other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated. Further, the Chamber is satisfied that following the attack of 6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.

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<sup>1194</sup> Exhibit P204, p 28.

<sup>1195</sup> Exhibit P204, p 28; *See also* Admiral Jokić, T 3906.

<sup>1196</sup> Milovan Zorc, T 6717; Admiral Jokić, T 4119-4123.

<sup>1197</sup> Milovan Zorc, T 6717.

(b) Mental element: did the Accused know or have reason to know that his subordinates were about to or had committed crimes?

415. The factual circumstances relevant to the mental element, as established by the evidence in this case, have been reviewed in this decision.<sup>1198</sup> Against that factual background Article 7(3) of the Statute gives rise to a significant issue. This is whether, by virtue of the JNA artillery fire on Dubrovnik to be expected in support of the attack the Accused ordered on Srd, he knew or had reason to know that in the course of the attack the JNA artillery would commit offences such as the acts charged. By way of general analysis the Accused knew of the recent shelling of the Old Town in October and November by his forces.<sup>1199</sup> Indeed, the forces in the attack on 6 December 1991 were among the forces involved at the time of the November shelling, and the unit directly located around Srd on 6 December was 3/472 mtbr which, under its same commander, had been identified as in a position to have participated in the November shelling.<sup>1200</sup> The October and November shelling occurred in association with attacks in which the JNA was seeking to capture further territory in the vicinity of Dubrovnik, including in November Srd.<sup>1201</sup> The 3/472 mtbr, and the 3/5 mtbr located to the immediate north of the 3/472 mtbr, were each equipped with substantial artillery capacity on 6 December 1991, as they had been in November.<sup>1202</sup> Existing orders in December precluded shelling of the Old Town, however that had also been the position with the October and November shelling,<sup>1203</sup> so that general orders had not proved effective as a means of preventing his troops from shelling Dubrovnik, especially the Old Town. The Accused well knew that no adverse action had been taken against anyone by virtue of the previous acts of shelling the Old Town, so that there had been no example of adverse disciplinary or other consequences shown to those who breached the existing orders, or international law, on previous occasions.<sup>1204</sup>

416. In the view of the Chamber, as discussed earlier in this decision, what was known to the Accused when he ordered the attack on Srd on 5 December 1991, and at the time of the commencement of the attack on 6 December 1991, gave the Accused reason to know that criminal

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<sup>1198</sup> See *supra*, paras 160; 167-169.

<sup>1199</sup> In particular, there is evidence that the events in October and November 1991 received broad media coverage. See Exhibits P215, P216 and P19. On 9 November 1991, Per Hvalkof, the Deputy Head of the ECMM Regional Centre in Split, sent two letters to the Accused, informing him that the ECMM monitors in Dubrovnik had reported shelling in the Old Town, T 2143; see Exhibit P61, tab 10 and tab 11. See also Exhibit P62, tab 13, Exhibit P61, tab 14; Exhibit P61 tab 15; Per Hvalkof, T 2151-2152; 2154. Further, following the shelling of the Old Town in November 1991, Admiral Jokić conducted an investigation and concluded that the 3/472 mtbr and possibly the artillery of the 472 mtbr were in a position to shell the Old Town. Admiral Jokić spoke *inter alia* with the Accused requesting the resignation of the above two officers, T 3996-3998.

<sup>1200</sup> Captain Nešić, T 8154-8155; Exhibit P118.

<sup>1201</sup> See Exhibits P121 and D57 regarding operations conducted in October and November 1991 respectively.

<sup>1202</sup> Paul Davies, T 589; 594-595; 607.

<sup>1203</sup> See, with respect to the October events, Exhibits P116 and P119; Admiral Jokić, T 3921-3923. See, with respect to the November events, Exhibit P118.

<sup>1204</sup> Admiral Jokić, T 3998-3999.

acts such as those charged *might* be committed by his forces in the execution of his order to attack Srd.<sup>1205</sup> Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. The language at first glance, could suggest a definite expectation that an offence will be committed. As the jurisprudence has helped to demonstrate, the operation intended by the provision is, relevantly, that an accused must be shown to have “reason to know” by virtue of information he possesses. This information must be such as at least to put him on notice of the risk of such offences so as to indicate the need for additional information or investigation to ascertain whether such offences were about to be committed. In other words an accused cannot avoid the intended reach of the provision by doing nothing, on the basis that what he knows does not make it entirely certain that his forces were actually about to commit offences, when the information he possesses gives rise to a clear prospect that his forces were about to commit an offence. In such circumstances the accused must at least investigate, *i.e.* take steps *inter alia* to determine whether in truth offences are about to be committed, or indeed by that stage have been committed or are being committed.

417. In the Chamber’s assessment of what was known to the Accused at or before the commencement of the attack on Srd, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srd, the artillery under his command *might well* get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this *would* occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of “reason to know” calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srd, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber’s assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srd, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.

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<sup>1205</sup> See *supra*, para 347.

418. That being so, the Chamber will therefore consider whether, in the course of the attack on Srd on 6 December 1991, what was known to the Accused changed so as to attract the operation of Article 7(3). In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Srd feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused was informed by the Federal Secretary of National Defence General Kadijević of a protest by the ECMM against the shelling of Dubrovnik.<sup>1206</sup> For reasons given earlier, the order of the Accused to attack Srd necessarily involved knowledge by him that JNA artillery might need to act against Croatian defensive positions in Dubrovnik which were threatening the lives of the attacking soldiers and the success of the attack on Srd.<sup>1207</sup> His knowledge, in the Chamber's finding, was that only a limited number of such Croatian defensive positions could exist and that, as the attack progressed, these positions could be subjected to controlled and limited JNA shelling targeted on these positions, or on what were believed by his forces to be such positions.<sup>1208</sup> While a protest such as had been made to General Kadijević could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise),<sup>1209</sup> and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Srd, was then occurring. This knowledge was of a nature, in the Chamber's view, that, when taken together with his earlier knowledge, he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijević ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, *i.e.* for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, *i.e.* so as to constitute criminal conduct.

419. As the Chamber has found earlier in this decision, already by about 0700 hours, there had been shelling of Dubrovnik by the Accused's forces,<sup>1210</sup> and, at least in respect of the Old Town, shelling that was not targeted at Croatian defensive positions or believed positions.<sup>1211</sup> Unlawful

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<sup>1206</sup> See *supra*, para 160.

<sup>1207</sup> See *supra*, para 343.

<sup>1208</sup> See *supra*, para 342.

<sup>1209</sup> The beginning of civil twilight on 6 December 1991 was 0631 hours and sunrise was at 0703 hours, T 8522.

<sup>1210</sup> See *supra*, paras 100-101.

<sup>1211</sup> See *supra*, paras 193-194.

shelling was occurring. By that time his attacking infantry had not reached Srđ, which was still being subjected to heavy JNA artillery shelling.<sup>1212</sup>

(c) Measures to prevent and to punish

(i) Measures to prevent

420. For reasons given in this decision, there was, in the Accused's knowledge at the time of his decision to order the attack on Srđ and when the attack commenced, a real risk that in the heat of the attack the JNA artillery would once again repeat its then recent and already repeated conduct of unlawful shelling of Dubrovnik, in particular of the Old Town.<sup>1213</sup> It has not been established, however, that there was a substantial likelihood of the artillery doing this, although that finding by the Chamber involved a difficult and somewhat finely balanced evaluation. That being so, however, the known risk was sufficiently real and the consequences of further undisciplined and illegal shelling were so potentially serious, that a cautious commander may well have thought it desirable to make it explicitly clear that the order to attack Srđ did not include authority to the supporting artillery to shell, at the least, the Old Town. Depending on the attitude of such a commander to the status of the Old Town, any such explicit clarification may have been qualified, for example, by words such as "except in the case of lethal fire from the Old Town", words which reflect the terms of one of the earlier orders. In the present case, however, for reasons already given, the Chamber is not persuaded that a failure to make any such clarification before the attack commenced gives rise to criminal liability of the Accused, pursuant to Article 7(3) of the Statute, for what followed. Any such clarification would have been merely by way of wise precaution. It remains relevant, however, when evaluating the events that followed, that no such precaution was taken.

421. There were of course existing orders. As described elsewhere in this decision, in some cases, their effect was to preclude shelling of Dubrovnik, others forbade the shelling of the Old Town itself.<sup>1214</sup> At least one order was qualified to allow for fire in return to lethal Croatian fire.<sup>1215</sup> The existence of such orders had not been effective to prevent the previous shellings. Further, no action had been taken to deal with those who were responsible for the previous breaches of existing orders.<sup>1216</sup> In these circumstances, in the Chamber's finding, the mere existence of such orders

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<sup>1212</sup> See *supra*, paras 122-123.

<sup>1213</sup> See *supra*, paras 347; 417.

<sup>1214</sup> Exhibits P118, P119, P116, D47. See also *supra*, para 61.

<sup>1215</sup> Exhibit P118, item 6.

<sup>1216</sup> Admiral Jokić gave evidence that he conducted an investigation into the shelling of the Old Town in November 1991, which led him to conclude that the 3/472 mtbr, under the command of Captain Kovačević, and possibly the artillery of the 472 mtbr, had been at the time in a position to shell the Old Town of Dubrovnik, T 3996-3998. Admiral Jokić testified that he then expressly requested the removal of both the commander and the

could not on 6 December 1991 be seen to be effective to prevent repetition of the past shelling of Dubrovnik, and especially the Old Town. In the Chamber's view, however, there is a relevant distinction between such existing orders which, with apparent impunity, had not been faithfully observed by the forces to whom they were given, and a further clear and specific order to the same effect, if given at the time of, and specifically for the purposes of, a fresh new attack. A new express order prohibiting the shelling of the Old Town (had that been intended by the Accused) given at the time of his order to attack Srd, would both have served to remind his forces of the existing prohibition, and to reinforce it. Further, and importantly, it would have made it clear to those planning and commanding the attack, and those leading the various units (had it been intended by the Accused) that the order to attack Srd was not an order which authorised shelling of the Old Town. In the absence of such an order there was a very clear prospect that those planning, commanding and leading the attack would understand the new and specific order to attack Srd as implying at least that shelling necessary to support the attack on Srd was authorised, notwithstanding existing orders. The events of 6 December 1991 demonstrate, in the view of the Chamber, that this prospect was realised. There is nothing to support the view that the Accused took any measures to guard against this. Indeed, as the Chamber has found, the intended implication of the Accused's order to attack Srd was that shelling, even of the Old Town, which was necessary to support the attacking infantry on Srd, could occur.<sup>1217</sup> As has been made clear in this decision, however, in the Chamber's finding what did occur on 6 December was deliberate, prolonged and indiscriminate shelling of the Old Town, shelling quite outside the scope of anything impliedly ordered by the Accused.<sup>1218</sup> It remains relevant, however, that nothing had been done by the Accused before the attack on Srd commenced to ensure that those planning, commanding and leading the attack, and especially those commanding and leading the supporting artillery, were reminded of the restraints on the shelling of the Old Town, or to reinforce existing prohibition orders.

422. Hence, when the Accused was informed by General Kadijević around 0700 hours of the ECMM protest, that put the Accused directly on notice of the clear likelihood that his artillery was then already repeating its earlier illegal shelling of the Old Town.<sup>1219</sup> The extent of the Accused's

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chief of staff of the 472 mtbr before the Accused's chief of staff, Admiral Kandić and the Accused. His request was not approved, T 3999. There is nothing in the evidence to suggest that the shelling of the Old Town in November 1991 and the consequent damage was ever investigated by the command of the 2 OG, and that disciplinary action of any type was taken against those responsible. Admiral Jokić, T 3999; Captain Pešić, T 7920-7922; Lieutenant-Colonel Đurasić, T 7004; Colonel Jovanović, T 7042-7043.

<sup>1217</sup> See *supra*, paras 347; 417.

<sup>1218</sup> See *supra*, para 345.

<sup>1219</sup> See *supra*, para 418.

existing knowledge of the October and November shelling of the Old Town,<sup>1220</sup> of the disciplinary problems of the 3/472 mtbr<sup>1221</sup> and of its apparent role, at least as revealed by Admiral Jokić's November investigation, in the November shelling of Dubrovnik, especially the Old Town,<sup>1222</sup> and of his failure to clarify the intention of his order to attack Srd in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991. This should have been starkly obvious. The evidence contains no suggestion whatever that any such order was issued by the Accused, or anyone else that day, save evidence of Admiral Jokić of an order to him around 0700 hours which is considered shortly.

423. There was also the obvious immediate need to learn reliably what JNA shelling was in truth occurring, and why. The means existed for ready direct communication between the commander of the attacking forces, Captain Kovačević at Žarkovica, and the Accused and his staff at Trebinje. Were the Accused concerned to know whether his forces were attacking Dubrovnik, or the Old Town, he could have received an immediate report from Žarkovica. Of course, the objective circumstances suggest that the Accused, at least through his staff, would have been regularly advised by telephone or radio of the progress of the attack.<sup>1223</sup> It was an attack of considerable political sensitivity given the location and timing. The Accused had ordered the attack himself. It is quite improbable that he did not receive reports. While this could have occurred through the

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<sup>1220</sup> In particular, there is evidence that the events in October and November 1991 received broad media coverage. See Exhibits P215, P216 and P19. On 9 November 1991, Per Hvalkof, the Deputy Head of the ECMM Regional Centre in Split, sent two letters to the Accused, informing him that the ECMM monitors in Dubrovnik had reported shelling in the Old Town, T 2143; see Exhibit P61, tab 10 and tab 11. See also Exhibit P62, tab13, Exhibit P61, tab 14; Exhibit P61 tab 15; Per Hvalkof, T 2151-2152; 2154.

<sup>1221</sup> The Chamber heard evidence that in the period October to December 1991 there were problems with discipline in the units of the 2 OG, in particular, incidents of unauthorised opening of fire, refusal to carry out orders, looting, arson and drinking. An order signed by the Chief of Staff of the 9 VPS Warship-Captain Zec on 8 October 1991 referred to incidents of impermissible conduct of soldiers including "wanton arson and destruction of facilities, plundering, violent behaviour, drunkenness and refusal to carry out orders." (Exhibit P105; See also Admiral Jokić, T 3873-3875) Another order, issued by Admiral Jokić on 31 October 1991 required all units subordinated to the 9 VPS to take specific measures to improve discipline. (Exhibit P107, Admiral Jokić, T 3877-3880; T 4512-4513) The reasons for the issuance of this order, as indicated in the order itself, were the observations by organs of the 9 VPS that "orders were not getting through to those ultimately carrying them out" and that there were "unlawful acts, wilfulness [sic], abuse and failure to follow and carry out orders" (Exhibit P107, p 1). See also Exhibit P108.

<sup>1222</sup> Admiral Jokić gave evidence that he conducted an investigation into the shelling of the Old Town in November 1991, which led him to conclude that the 3/472 mtbr, under the command of Captain Kovačević, and possibly the artillery of the 472 mtbr, had been at the time in a position to shell the Old Town of Dubrovnik, T 3996-3998. Admiral Jokić testified that he then expressly requested the removal of both the commander and the chief of staff of the 472 mtbr before the Accused's chief of staff, Admiral Kandić and the Accused. His request was not approved, T 3999.

<sup>1223</sup> See *supra*, para 393.

9 VPS command in accordance with normal structures, there could equally have been direct reporting especially as the attack was made on the Accused's order. There are no JNA records in evidence of such reports but we do not have complete records. It is apparent from his conversation with Colm Doyle that the Accused was, at that stage of the day, informed of the events at Dubrovnik and apparently preoccupied by then.<sup>1224</sup> Were it the case, however, that before 0700 hours the Accused did not know, and considered it necessary to know, what JNA shelling was in truth occurring at Dubrovnik, and for what reason, he had at that time and thereafter during the day the ready and immediate means to obtain a direct report from the commander of the attack at Žarkovica. Equally he, personally or by his staff, had the ready and immediate means to obtain a report from Admiral Jokić or the 9 VPS command post.<sup>1225</sup> This was the position throughout the day save, of course, that Admiral Jokić travelled with him to Belgrade in the afternoon. As the Chamber has found the Accused did telephone Admiral Jokić after he heard that Dubrovnik was being shelled.<sup>1226</sup> It was the effect of the Admiral's evidence that he knew nothing of shelling of Dubrovnik but he did report to the Accused that Captain Kovačević was about to attack Srd.<sup>1227</sup> That last report was correct as Kovačević's troops were moving. They did not reach Srd until about 0800 hours.<sup>1228</sup> The Chamber has reservations, however, as discussed elsewhere, about the Admiral's evidence about parts of his conversation with the Accused.<sup>1229</sup> On the Admiral's account, if it were true, the Admiral was not able to give the Accused any information about shelling of Dubrovnik, or why any such shelling was occurring. Had that been the case, as has been indicated, the Accused had the ready means to obtain a first hand report directly from Žarkovica, were the Accused in truth concerned to learn the position. Further, had the Accused felt the need for more reliable information at any time during the day, Trebinje was close enough to Žarkovica and Kupari, for one of the Accused's own staff conveniently and quickly to travel by road and to be able to report directly to the Accused.

424. Just as the Accused had the ready and immediate means to be informed of the circumstances in Dubrovnik, and the Old Town, regarding JNA shelling, and to readily send his own staff to further investigate and report, he also had the ready and immediate means throughout 6 December 1991 to communicate orders to the commander of the attacking forces, Captain Kovačević, and to the other senior 9 VPS officers at Žarkovica, including Warship-Captain Zec. Any orders he considered necessary could be readily communicated directly to Žarkovica, or

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<sup>1224</sup> Colm Doyle, T 1714-1716.

<sup>1225</sup> The means of communications were working. Admiral Jokić, T 4681-4684; Colonel Kurđulija, T 7864-7866; 7870; Frigate-Captain Handžijev, T 7641; 7648-7649; 7676.

<sup>1226</sup> See *supra*, para 160.

<sup>1227</sup> Admiral Jokić, T 4046-4047.

<sup>1228</sup> See *supra*, paras 122-123.

<sup>1229</sup> See *supra*, paras 152-154.

communicated through the Command of the 9 VPS. Had the Accused been concerned that an order he made had not been communicated to Žarkovica, or that for whatever reason an order he had made was not being complied with, one of his own staff could conveniently and quickly have travelled to Žarkovica to deal with the situation. Admiral Jokić could have gone to Žarkovica even more quickly, at least during the morning, had the Accused ordered him to personally assess and take charge of the situation.<sup>1230</sup> Neither Admiral Jokić nor any Staff officer from the Accused's 2 OG at Trebinje was at Žarkovica at any time that day.

425. While the Chamber has reservations about some aspects of the evidence of Admiral Jokić as to the content of the conversation he had with the Accused at about 0700 hours, reservations because the effect of the Admiral's evidence is that at that time he had no knowledge of the order of the Accused to attack Srd that morning and, as a consequence, he could not immediately accept that Dubrovnik was being shelled,<sup>1231</sup> it is the evidence of the Admiral that the Accused ordered him to stop the attack.<sup>1232</sup> If that were the case, it would be most material to the present issue. The Chamber understood the evidence of the Admiral to be that he was ordered by the Accused to stop the attack on Srd. If there was in truth such an order, given by the Accused, which is not the finding of the Chamber, neither the attack on Srd nor the shelling of Dubrovnik were stopped. What Admiral Jokić in fact did, following the conversation, is also of significance to the question of what orders were given. He did persistently prevent the heavy howitzer battery at Čilipi from firing that day despite ongoing requests from Captain Kovačević at Žarkovica.<sup>1233</sup> In this respect the Chamber accepts that for whatever reason Admiral Jokić decided that the shelling of Dubrovnik should not be further aggravated by allowing the heavy howitzers to fire that day. No effective steps were taken, however, by Admiral Jokić to stop the many JNA mortars from shelling Dubrovnik, especially the Old Town. Whether this action to stop the howitzers was a decision of Admiral Jokić acting alone, or on an order of the Accused, or a joint decision of the Accused and Admiral Jokić made during their telephone conversation, and whether it was because of the news of General Kadijević's anger and concern about the shelling of Dubrovnik, are matters which cannot be resolved on the evidence. Further, according to what other evidence there is, Admiral Jokić ordered his Chief of Staff, Warship-Captain Zec, and at least one other senior 9 VPS army Staff officer to go to Žarkovica.<sup>1234</sup> There is also evidence that, in turn, Warship-Captain Zec ordered a junior Staff officer to deliver a message to Captain Kovačević at Žarkovica not to shell the Old

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<sup>1230</sup> Milovan Zorc, T 6642-6644.

<sup>1231</sup> *See supra*, para 153.

<sup>1232</sup> Admiral Jokić, T 4052.

<sup>1233</sup> Admiral Jokić, T 4052-4053. *See also* Captain Pepić, T 7484-7485; T 7491; T 7582-7583, and Captain Nešić, T 8182-8183.

<sup>1234</sup> Admiral Jokić, T 4052.

Town.<sup>1235</sup> This was neither an order to stop the attack on Srđ, nor an order to stop shelling Dubrovnik. If such an order was delivered, which is not the finding of the Chamber, it was not acted on by Captain Kovačević.

426. Warship-Captain Zec did go to Žarkovica himself a little later, around 0800 hours, and remained throughout the day until after 1500 hours.<sup>1236</sup> He did not stop the attack on Srđ, or the shelling of Dubrovnik, or the shelling of the Old Town. From Žarkovica he had first hand knowledge and full vision of what was in truth occurring, both at Srđ and the shelling of Dubrovnik, especially the Old Town. Warship-Captain Zec as Chief of Staff of the 9 VPS had full capacity to give and enforce orders to stop the attack on Srđ, and the shelling of Dubrovnik and the shelling of the Old Town. Instead he actively supported the ongoing attack on Srđ into the afternoon, including arranging for further specialised explosives for use by the attacking infantry against the fortress of Srđ, explosives that arrived too late to be used as the attacking troops were by then withdrawing.<sup>1237</sup> In the Chamber's finding it is simply not believable that Warship-Captain Zec would take these serious measures without the authority of his superiors, or contrary to their orders. He was a senior career naval officer in a highly structured armed force. To have acted without authority, or contrary to orders, in these circumstances to allow the continuation of the shelling of the Old Town, or of Dubrovnik, or the attack on Srđ would be the end of his career. It is not suggested that any disciplinary or other adverse action has been taken against him by either Admiral Jokić or the Accused. While there is the possibility, as suggested by the evidence of Admiral Jokić, that the order of the Accused to attack Srđ was kept from the Admiral,<sup>1238</sup> that possibility would admit only of the prospect that Warship-Captain Zec acted throughout the 6 December 1991 directly on the orders of the Accused. That does not appear to be a very likely situation, given that Warship-Captain Zec was a naval officer and Chief of Staff to Admiral Jokić, and was merely subject to the temporary command of the Accused, who was an army officer.

427. The only explanation in the evidence for the attack on Srđ not ceasing, following what is said to be the Accused's order to Admiral Jokić around 0700 hours, is the suggestion that the order was too late for it to be possible to stop the attack as the troops were already exposed to fire as they approached Srđ.<sup>1239</sup> This does not bear examination. While the troops approaching Srđ were exposed to fire, that situation could only worsen as they got closer to Srđ. In the finding of the Chamber it is apparent that the attacking troops on Srđ could have been withdrawn at any stage of

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<sup>1235</sup> Captain Drljan, T 7701.

<sup>1236</sup> Captain Pepić, T 7483-7484; Admiral Jokić, T 4101. *See also supra*, para 126.

<sup>1237</sup> Colonel Jovanović, T 7026-7029.

<sup>1238</sup> On the Admiral's evidence, on the eve of 6 December 1991 Captain Kovačević reported to the command post of 2 OG instead of the command post of 9 VPS to which he was directly subordinated, T 4132.

<sup>1239</sup> Exhibit D96, p 67, entry at 0740 hours, 6 December 1991; Exhibit D62.

the day, especially at around 0700 hours, with less risk to them than in pursuing the attack. Instead they pressed home the attack until after 1400 hours.<sup>1240</sup> This conduct provides telling and compelling evidence of the true state of the orders given by the Accused in respect of the attack on Srd. In the Chamber's finding there was no order at around 0700 hours to stop the attack on Srd. Nor was there an order to stop the shelling of Dubrovnik, or the Old Town. Further, as found earlier in this decision, there was no order for the infantry attacking Srd to cease fire with effect from 1115 hours or at any other time in the day, until they were permitted to withdraw after 1400 hours. The attack against Srd was pursued with determination until after 1400 hours.

428. As the Chamber has found earlier in this decision, the Accused did order what was called a ceasefire to take effect at 1115 hours.<sup>1241</sup> This was pursuant to negotiations between Admiral Jokić and Minister Rudolf earlier in the morning. It appears not to have been a written order. It is not revealed in the evidence how it was given to JNA units. The clear inference is that it was transmitted by radio or telephone. What is most significant, however, is that the order was not given to all units. The commander of the 3/5 mtbr received no order to cease fire at 1115 hours.<sup>1242</sup> In fact he was concerned to know whether there was an order to cease fire at 1200 hours, as he had heard Warship-Captain Zec indicate this the night before, when Warship-Captain Zec had said the attack on Srd had to be concluded by 1200 hours. Therefore the commander of the 3/5 mtbr sought confirmation from the command of the 9 VPS shortly before 1200 hours whether his mortars should cease fire. They had not stopped firing at 1115 hours. The Old Town was out of range of those mortars, but they were firing at the northwestern suburbs of Dubrovnik. The fall off in JNA artillery fire in Dubrovnik at about 1115 hours<sup>1243</sup> indicates that an order to cease fire did reach at least some other operative JNA mortar batteries. The evidence of those leading the infantry units actually trying to capture Srd is clear, however, in the finding of the Tribunal, that there was no order for them to cease fire at 1115 hours.<sup>1244</sup> Instead their attack on Srd was pursued until after 1400 hours and, in what was clearly a fresh effort to deal with the Croatian defenders underground in the fort at Srd, on the order of Warship Captain Zec, special explosives were obtained late in the

<sup>1240</sup> See *supra*, paras 140-141; 144.

<sup>1241</sup> See *supra*, paras 156-157.

<sup>1242</sup> Lieutenant-Colonel Jovanović, T 8093.

<sup>1243</sup> See *supra*, para 107.

<sup>1244</sup> Lieutenant Lemal, the commander of the 2<sup>nd</sup> company of the 3/472 mtbr was not aware of any order to cease fire on 6 December, T 7415-7416. He stated in evidence that the only order he received was that of Captain Kovačević, sometime in the afternoon of 6 December, to withdraw the unit to its starting position at Strinčijera, T 7375-7376. On 6 December 1991, Lieutenant-Colonel Stojanović, the commander of the 3<sup>rd</sup> company of the 3/472 mtbr, testified that he did not receive any order to stop the attack on Srd by his company, T 7833. Lieutenant Pešić, the platoon commander of the 3<sup>rd</sup> company of the 3/472 mtbr stationed at Bosanka, testified that he did not receive any order on 6 December 1991 to suspend the attack on Srd or to return to this position, T 7902-7903. In fact, the evidence shows that it is only hours later, starting at around 1400 hours, that the JNA units started to withdraw from Srd. See Captain Nešić, T 8185; Captain Drljan, T 7718; See also Exhibits D65 and D96; See *supra*, para. 139.

attack for use by the attacking infantry.<sup>1245</sup> These were being delivered to Žarkovica sometime between 1400 and 1500 hours when the vehicle was stopped on the road with the news that the explosives were no longer required.<sup>1246</sup> The retreat had been decided on.

429. While all possible circumstances have not been explored in the evidence, two factors stand out as ensuring that the so called ceasefire order for 1115 hours ordered by the Accused was not effective. In the Chamber's finding, first, the failure of the Accused to order the cessation of the attack on Srd at the same time as the ceasefire order was given to most JNA artillery units, had what was a virtually inevitable consequence in the circumstances. As the JNA infantry attack on Srd was still being maintained, the Croatian defensive artillery in Dubrovnik had need to continue their support of the desperately situated Croatian defenders on Srd. Without Croatian mortar fire on the attacking JNA forces surrounding the fort, it seems inevitable that Srd would have fallen to the JNA. The Chamber would note that, to the Croatian forces, the continued attack on Srd no doubt appeared in itself to be a breach of the ceasefire by the JNA. The effect of the continued Croatian artillery firing on the attacking JNA troops at Srd, inevitably, was that the JNA artillery continued to fire. What followed indicates that the JNA artillery fire continued, not only at Croatian defensive positions in Dubrovnik, but also in the indiscriminate manner that had been established during the morning. It continued until after 1500 hours when the attacking forces on Srd had finally abandoned their attempt to capture Srd and had retreated.<sup>1247</sup> To the extent that the ongoing destruction of Dubrovnik, especially the Old Town, was no doubt seen by some as a further means of encouraging capitulation by the Croatian defenders on Srd, the continuation of the indiscriminate JNA artillery attack had, in the end, proved a failure. Secondly, the failure of the Accused to ensure that his ceasefire order for 1115 hours reached all active JNA artillery led to the continued firing by the 3/5 mtbr mortars on the northwestern parts of Dubrovnik. This also constituted a serious breach of the ceasefire by the JNA. In the face of this provocation, in such tense circumstances, continued Croatian artillery firing was inevitable. That in turn, had the practical effect of ensuring the resumption of full JNA artillery firing not long after 1115 hours.

430. The ongoing firing after 1115 hours continued until after 1500 hours, and even later. The evidence discloses no further action to stop the JNA firing while the infantry attack on Srd continued. For much of the afternoon the Accused was in Belgrade with Admiral Jokić. Rather than there being active measures to stop the attack by those left in Command during his absence, a message, sent in his name but perhaps in his absence by his command, to Dubrovnik in the early afternoon purported to deny that there had been any shelling of the Old Town by JNA artillery since

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<sup>1245</sup> Colonel Jovanović, T 7026-7028.

<sup>1246</sup> Colonel Jovanović, T 7029.

<sup>1247</sup> See *supra*, paras 110; 141.

the 1115 hours ceasefire, and contended that any damage being suffered was being caused by the Croatian forces.<sup>1248</sup> This highly provocative communication not only entirely misrepresented what was in truth occurring at that time, it precludes any inference of there being efforts then underway to cease JNA artillery firing, either on the orders of the Accused or by those left in command of the 2 OG during his absence in Belgrade.

431. In the Chamber's finding, even allowing for the possibility that the order of the Accused to attack Srđ was kept from Admiral Jokić, having regard to all circumstances established by the evidence, it has been established that Warship-Captain Zec was acting pursuant to the Accused's order to take Srđ throughout the day, and this attack was only abandoned when it became inevitable that the attack could not succeed. For whatever precise reason, the JNA artillery shelling of Dubrovnik, including the Old Town, was continued in association with that attack on Srđ, even though its nature had changed from that contemplated by the Accused's original order.

432. In fact the shelling of the Old Town and the wider Dubrovnik continued despite the protest to General Kadjević in Belgrade and other protests from Dubrovnik. The shelling intensified after about 0800 hours when the shelling of Srđ by the JNA ceased because the JNA infantry had reached Srđ.<sup>1249</sup> It continued until after 1500 hours, by which time the JNA infantry attacking Srđ had completed their withdrawal, and thereafter intermittently until after 1630 hours.<sup>1250</sup> At no time during the day had JNA shelling of the Old Town been targeted at Croatian military defensive positions, or believed positions, in the Old Town.<sup>1251</sup> The shelling of the Old Town had been deliberate, widespread and indiscriminate, as indeed had much of the shelling of the wider Dubrovnik.<sup>1252</sup> As has been indicated the evidence discloses that this was obvious to anyone observing from Žarkovica that day.

433. As considered elsewhere in these reasons, the Accused had the legal authority and the material means to have stopped the shelling of the Old Town throughout the ten and a half hours it continued, as he also had the means and authority to stop the shelling of the wider Dubrovnik.<sup>1253</sup> No steps that may have been taken by the Accused were effective to do so. While the forces responsible for the shelling were under the immediate command of the 9 VPS, they were under his superior command and were engaged in an offensive military operation that day pursuant to the order of the Accused to capture Srđ.

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<sup>1248</sup> Exhibit P23. Minister Rudolf, T 5602-5604.

<sup>1249</sup> *See supra*, paras 107; 123-124.

<sup>1250</sup> *See supra*, paras 110 and 140.

<sup>1251</sup> *See supra*, paras 193-194.

<sup>1252</sup> *See supra*, para 214.

<sup>1253</sup> *See supra*, para 414.

434. While the finding of the Chamber is that the Accused did not order that the attack on Srd be stopped when he spoke to Admiral Jokić around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Srd be stopped.

(ii) Measures to punish

435. As found earlier in this decision, in the afternoon of 6 December 1991 the Accused and Admiral Jokić went to Belgrade to meet with General Kadijević and report on the attack that morning.<sup>1254</sup> The Accused was present throughout the meeting.<sup>1255</sup> In essence its outcome was that Admiral Jokić was given the task of trying to repair the damage (to the JNA's standing and to its relations with the various international, Croatian government and Dubrovnik representatives) caused by the shelling of Dubrovnik, especially the Old Town, that day, and to try to "sort things out."<sup>1256</sup> This was a damage control exercise by the JNA as a consequence of the adverse international reaction to the shelling. To this end Admiral Jokić had proposed at the meeting in Belgrade that he should undertake an enquiry into the shelling.<sup>1257</sup> An investigation of some type was an obvious step in deflecting adverse international opinion. As the forces involved in the JNA attack were all under the immediate command of Admiral Jokić he had appropriate investigative and disciplinary powers.

436. In the Chamber's finding, what was in fact done following the Belgrade meeting evidences the tenor and the effect of the understanding or instructions Admiral Jokić took from the Belgrade meeting. For reasons given earlier in this decision, the Chamber has found that the enquiry undertaken by Admiral Jokić was a sham.<sup>1258</sup> While assurances of a thorough investigation, and that the perpetrators of the attack would be disciplined, were given to the international, Croatian government and Dubrovnik representatives by Admiral Jokić,<sup>1259</sup> it seems that only a few written statements and reports were obtained in the day or two after 6 December 1991.<sup>1260</sup> These

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<sup>1254</sup> See *supra*, paras 170-171.

<sup>1255</sup> Admiral Jokić, T 4076-4079. See *supra*, para 171.

<sup>1256</sup> See *supra*, paras 172-173.

<sup>1257</sup> See *supra*, para 172.

<sup>1258</sup> See *supra*, para 174.

<sup>1259</sup> Minister Rudolf, T 5612, Exhibit P61, tab 33; Per Hvalkof, T 2204, Exhibit P61, tab 35.

<sup>1260</sup> Admiral Jokić testified that he asked for written reports from the Battalion Commander, the Chief of Staff Warship-Captain Zec, Lieutenant-Colonel Kovačević and Captain Kozarić, T 4094-4095. Lieutenant-Colonel Jovanović was also asked to submit a written report to the command of the 9 VPS at around 1400 hours on

apparently supported the view, in essence, that the attack on Srd was the spontaneous reaction of Captain Kovačević of the 3/472 mtbr to provocations by Croatian forces at Srd during the night of 5/6 December 1991. He acted alone and contrary to orders in carrying out the attack on Srd. Further, while there had been some shelling of Dubrovnik, this was in support of the attack on Srd and was apparently targeted at active Croatian military positions. The extent of the shelling and the damage it caused, especially to the Old Town, were significantly downplayed.<sup>1261</sup> The disciplinary consequences of the investigation was said to be that a battalion commander had been relieved of his command. Contrary to what may have been understood by many at the time, it is now clear that this battalion commander was not the commander who led the attack on Srd and the shelling, *i.e.* Captain Kovačević of the 3/472 mtbr. As indicated elsewhere in this decision, it was Lieutenant-Colonel Jovanović of the 3/5 mtbr.<sup>1262</sup> Rather than being the commander of that battalion, he was only the temporary commander. He had been appointed to the temporary command on 5 December, after the commander was granted leave, and he was relieved of his command on the evening of 6 December, on the order of Admiral Jokić.<sup>1263</sup> He was immediately returned to his normal duties. No disciplinary or other adverse action was taken against him by anyone and he continued in his military career.<sup>1264</sup> No disciplinary or other adverse action was taken against Captain Kovačević by Admiral Jokić. Admiral Jokić took no other disciplinary or administrative action to better determine the truth of what occurred or to deal with those responsible. As the evidence in this trial has established, the 120mm mortars of the 3/5 mtbr were not within range of the Old Town on 6 December 1991.<sup>1265</sup> These mortars fired extensively on 6 December 1991 but they could not have shelled the Old Town. These were the only heavy weapons under the command of Lieutenant-Colonel Jovanović on 6 December 1991. He was the *only* JNA officer against whom Admiral Jokić took adverse action. It is established, therefore, that no one had suffered any form of adverse disciplinary or administrative action for the shelling of the Old Town on 6 December 1991 by virtue of Admiral Jokić's investigation of the shelling.

437. The Admiral in effect says he could not find any satisfactory evidence to enable him to do anything more.<sup>1266</sup> That is surprising indeed. The nature and extent of the planning on 5 December 1991 and the identity and the role of the people involved made it rather glaringly

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6 December, T 8087-8088; Exhibit D108. Captain Nešić testified that on 7 December 1991 officers from the command of the 9 VPS visited the soldiers of the 3/472 mtbr and spoke to them, T 8187. *See also* Exhibit D112. Lieutenant Lemal also testified that on 6 December officers of the 9 VPS visited his unit to discuss what had happened during that day and the moral of the troops, T 7420-7422.

<sup>1261</sup> *See supra*, para 174.

<sup>1262</sup> Lieutenant-Colonel Jovanović, T 8094; Exhibit D65; Admiral Jokić, T 8553. *See supra*, para 174.

<sup>1263</sup> *See supra*, para 387.

<sup>1264</sup> According to Lieutenant-Colonel Jovanović his removal meant that he changed from the fast track of promotion to the regular track, T 8098.

<sup>1265</sup> Admiral Jokić, T 4022-4023.

<sup>1266</sup> Admiral Jokić, T 4116-4117.

obvious that the attack on 6 December 1991 was pre-planned and not a spontaneous action by Captain Kovačević, the Commander of the 3/472 mtbr, which is what Admiral Jokić seeks to suggest he first understood the attack to be. Even if he had thought the attack to be the conduct of Captain Kovačević, there is no satisfactory explanation why no disciplinary or other action was taken by him against Captain Kovačević. The suggestion which was made that he was being protected by the Accused<sup>1267</sup> does not explain why the Admiral did not exercise his own administrative and disciplinary authority. An even less clear indication in the evidence that a decision to relieve Captain Kovačević of his command could not be implemented because his troops would not allow this to happen,<sup>1268</sup> is neither sufficiently established by the evidence nor credible as a matter of fact. Were it true it would be demonstrative of a failure of command responsibility. Rather than being subjected to disciplinary or other adverse action, it was Captain Kovačević who was in fact promoted only 8 days after 6 December 1991.<sup>1269</sup> The other version of the events which emerged in the evidence of Admiral Jokić was that the planning of the attack and the ordering of it was deliberately kept from him.<sup>1270</sup> If that were so, the conduct in particular of his Chief of Staff Warship-Captain Zec would have warranted the most severe disciplinary action. Their personal and professional relationship would have been shattered. Yet no action was taken and both the Admiral and Warship-Captain Zec continued in their previous roles as Commander and Chief of Staff of 9 VPS.

438. The Defence submits that, by virtue of the events at this meeting in Belgrade on 6 December 1991, the Accused was excluded from the process of the investigation of the action at Dubrovnik and precluded from taking any part in, or exercising any of his authority with respect to, the discipline of those involved.<sup>1271</sup> It is submitted that this follows because General Kadijević, the Accused's superior, had assumed direct responsibility and had by-passed the Accused by ordering Admiral Jokić to investigate and to report directly to him.<sup>1272</sup> It is submitted that Admiral Jokić was given an extraordinary assignment to report directly to the General Staff, a report which was not submitted through the 2 OG,<sup>1273</sup> and that "the command of the 2 OG was totally excluded from the process of the establishment of the cause, the course and the consequences of the action carried out in the zone of responsibility of the 9 VPS on 6 December 1991."<sup>1274</sup> The Defence further submits that as Admiral Jokić exercised his authority to relieve from duty Lieutenant-Colonel Jovanović on

<sup>1267</sup> Admiral Jokić, T 4081-4087; 4130.

<sup>1268</sup> Slobodan Novaković testified that after 6 December the army wanted to replace Captain Kovačević but the soldiers were against that, T 6837-6838.

<sup>1269</sup> See *infra*, para 441.

<sup>1270</sup> On the Admiral's evidence, on the eve of 6 December 1991 Captain Kovačević reported to the command post of 2 OG instead of the command post of 9 VPS to which he was directly subordinated, T 4132.

<sup>1271</sup> Defence Final Brief, paras 447-486.

<sup>1272</sup> Defence Final Brief, paras 447-451.

<sup>1273</sup> Defence Final Brief, para 482.

6 December, and submitted a report directly to the General Staff, “from that moment on [Admiral Jokić’s] right and duty [...] to carry out the investigation could be neither stopped nor restricted by anyone.”<sup>1275</sup>

439. In the Chamber’s finding, the facts do not provide a foundation for these submissions. What is submitted is not the legal effect of what occurred, nor, in the Chamber’s finding, is there the factual basis in the evidence for any suggestion that the Accused believed this to be the case in 1991. The Chamber is not persuaded in these circumstances that it is revealed that the Accused was, or thought himself to be, excluded from acting, or that he was ordered not to take action in respect of the events of 6 December 1991. Rather, the evidence persuades the Chamber that the Accused was, at the very least by acquiescence, a participant in the arrangement by which Admiral Jokić undertook his sham investigation and sham disciplinary action, and reported to the First Secretariat in a way which deflected responsibility for the damage to the Old Town from the JNA.

440. The Accused was present throughout the meeting in Belgrade with General Kadijević.<sup>1276</sup> It is the evidence that the General was equally critical of both the Accused and Admiral Jokić.<sup>1277</sup> It is not suggested by the evidence that the Accused objected or resisted in any way at the meeting, or later, to the proposal of Admiral Jokić that he should investigate, or to General Kadijević’s apparent acceptance of that.<sup>1278</sup> There is no suggestion in the evidence that at any time he proposed or tried to investigate or to take any action against any subordinate for the shelling of the Old Town, or that he was prevented from doing so by General Kadijević or any other authority.

441. As admitted by the Accused to Colm Doyle, and as found by the Chamber, the Accused himself had a direct role in the launching of military action on 6 December, a military action which got gravely out of hand, conduct which may be seen to well justify the critical view taken by General Kadijević. Nevertheless, this indicates that the Accused was in sympathy with the military objectives of the JNA action on 6 December. These factors provided clear reasons why the Accused would not be minded to have the events of 6 December fully investigated, or to take disciplinary or other adverse action himself against those who directly participated. In addition, other evidence tends to confirm that the Accused remained in sympathy with the military objectives of that action and supportive of those who participated. Within a week or so of 6 December 1991, effect was given to a proposal commenced in November, and which necessarily had the endorsement of the Accused as Commander of the 2 OG, for the promotion of Captain Kovačević

<sup>1274</sup> Defence Final Brief, para 483.

<sup>1275</sup> Defence Final Brief, para 466.

<sup>1276</sup> Admiral Jokić, T 4079, 4080.

<sup>1277</sup> Admiral Jokić, T 4079.

<sup>1278</sup> Admiral Jokić, T 4081.

who led the actual attack on 6 December 1991.<sup>1279</sup> This promotion occurred in mid-December, despite his critical role in the events of 6 December 1991. There is no suggestion in the evidence of any attempt by the Accused to stop the promotion. Further, while there is some dispute as to whether it occurred in mid-December 1991 or March 1992, or indeed at all,<sup>1280</sup> it is also the case, in the Chamber's finding, that on the occasion of a visit to 3/472 mtbr by General Panić, the JNA Deputy Chief of General Staff, when both the Accused and Admiral Jokić were present, the Accused invited Captain Kovačević to nominate outstanding participants in the events of 6 December 1991.<sup>1281</sup>

442. In these circumstances the Chamber is satisfied that it was not the case that the Accused had been excluded from the exercise of his powers and authority to investigate or discipline the officers of the 9 VPS that conducted the attack on 6 December 1991 and were responsible for the shelling of the Old Town, or that he had been ordered not to act in the matter. Rather, the Chamber finds, he was, at the least, prepared to accept a situation in which he would not become directly involved, leaving all effective investigation, action and decisions concerning disciplinary of other adverse action to his immediate subordinate, Admiral Jokić, whose task effectively was known to the Accused to be to smooth over the events of 6 December 1991 as best he could with both the Croatian and ECMM interests, while providing a basis on which it could be maintained by the JNA that it had taken appropriate measures.

443. The Chamber would also observe that the reporting of Admiral Jokić to General Kadijević and other members of the Federal Secretariat does not have the significance, factually or legally, which the Defence would seek to place on it. It is the case that, by the normal command structure of the JNA, a communication from Admiral Jokić to General Kadijević would pass through the Commander of the 2 OG. The apparent circumstances that, at a meeting when all three were present, it was accepted that a report on one issue could or should be made by Admiral Jokić directly to General Kadijević or the Federal Secretariat does not necessarily have any implication for the role and authority of the Accused, either in respect of that one issue or generally. It need be no more than a convenient administrative method of dealing with that one issue, a method acceptable to all three parties. Most significantly, in the finding of the Chamber, the nature of Admiral Jokić's reporting was NOT to provide General Kadijević with information and/or recommendation for action and decision by General Kadijević in respect of the events of 6 December 1991 and consequent disciplinary action. Admiral Jokić merely reported what had occurred and what action he had taken. All decision and action was by Admiral Jokić. That was

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<sup>1279</sup> Exhibit P133; Admiral Jokić, T 4119-4122; Lieutenant Lemal, T 7440-7441.

<sup>1280</sup> Captain Nešić, T 8191.

<sup>1281</sup> Admiral Jokić, T 4117-4119.

within his capacity and authority as commander of the 9 VPS. The Admiral reported after he had acted. His report was merely to inform the Federal Secretariat of the action that had been taken by him as Commander of the 9 VPS. The Accused, as Admiral Jokić's immediate superior, remained undisturbed and unrestrained in his power and authority to require more to be done by the Admiral, or to act directly himself, had he so chosen. There was in fact no decision or action by General Kadijević as the Accused's superior, and none was contemplated by Admiral Jokić's reporting, which could be taken to impede any action the Accused chose to take, or to limit or restrict the Accused's authority as commander of the 2 OG, in any way.

444. The evidence establishes, in the Chamber's finding, that the Accused at all material times had full material and legal authority to act himself to investigate, or take disciplinary or other adverse action, against the officers of the 9 VPS who directly participated in, or who failed to prevent or stop, the unlawful artillery attack on the Old Town on 6 December 1991. Despite this the Accused chose to take no action of any type. Given that one line of the Defence case is to submit that Admiral Jokić, and his staff at 9 VPS, planned, authorised and oversaw the attack on Dubrovnik on 6 December 1991, and deliberately kept word of the attack from the Accused and 2 OG, until the attack had failed,<sup>1282</sup> it must also be recorded, in the Chamber's finding, that at no time did the Accused institute any investigation of the conduct of Admiral Jokić or his staff, or take any disciplinary or other adverse action against them in respect of the events of 6 December 1991.

445. While it is not the finding of the Chamber, we would also observe that had it been the case that the Accused understood that General Kadijević, in some way, had purported to usurp the Accused's power and authority to investigate and discipline the conduct of forces under his command in respect of the events of 6 December 1991, that would not have been sufficient in the circumstances to relieve the Accused of his responsibility as Commander of 2 OG, or to excuse him for failing to take appropriate investigative and disciplinary action. What had occurred necessitated, in the Chamber's view, positive efforts by the Accused to seek to take effective investigative and disciplinary measures against those under his command who had been responsible for the shelling of the Old Town, and those who had failed to take appropriate steps to ensure that the shelling was stopped. Had the Accused attempted to do so, but had found that General Kadijević prevented or hampered his efforts, continued further efforts and protests by the Accused to insist that action be taken would have been appropriate.<sup>1283</sup> In the end the remedy of resignation from the JNA would have been appropriate in the circumstances. Of course, none of these things occurred.

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<sup>1282</sup> Defence Final Brief, paras 685-687.

<sup>1283</sup> *See supra*, para 374.

### 3. Conclusion

446. In view of the findings made earlier in this section, the Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.

## VIII. CUMULATIVE CONVICTIONS

### A. Should there be cumulative convictions?

447. The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct. In this case the artillery attack against the Old Town by the JNA on 6 December 1991 underlies all the offences charged in the Indictment. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if “each statutory provision involved has a materially distinct element not contained in the other”.<sup>1284</sup> Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision.<sup>1285</sup>

448. For the reasons given earlier, the Chamber is satisfied that the elements required for establishing the Accused’s criminal responsibility pursuant to Article 7(3) of the Statute, but NOT pursuant to Article 7(1), have been proved in respect of each of the six counts in the Indictment.

449. The issue of cumulation arises first in relation to the offences of murder (Count 1), cruel treatment (Count 2) and attacks on civilians (Count 3). The statutory basis and the elements of each of these offences have been analyzed earlier in this decision. A strict application of the above mentioned Appeals Chamber test would allow cumulative convictions for murder and cruel treatment as they each contain materially distinct elements (*i.e.* proof of the death of one or more individuals resulting from an act or omission of the accused for murder and mental or physical suffering or injury, or constituting a serious attack on human dignity resulting from an intentional act or omission of the accused for cruel treatment). However, since murder and cruel treatment do not contain an element in addition to the elements of attacks on civilians and because the offence of attacks on civilians contains an additional element (*i.e.* an attack) it is, theoretically, the more specific provision.

450. In the present case, the essential criminal conduct was an artillery attack against the Old Town inhabited by a civilian population. In the course of that attack civilians were killed and injured. The essential criminal conduct of the perpetrators is directly and comprehensively reflected in Count 3. The offence of attacks on civilians, involved an attack directed against a civilian population, causing death, and also serious injury, with the intent of making the civilian population the object of the attack. Given these circumstances, in the present case, the offence of murder adds

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<sup>1284</sup> *Čelebić* Appeals Judgement, para 412. See also *Kordić* Appeals Judgement, para 1032.

<sup>1285</sup> *Čelebić* Appeals Judgement, para 413. See also *Krstić* Appeals Judgement, para 218, for a more recent articulation of the test by the Appeals Chamber.

no materially distinct element, nor does the offence of cruel treatment the gravamen of which is fully absorbed by the circumstances in which this attack on civilians occurred.

451. For these reasons it appears to the Chamber that this is a case in which there is no materially distinct element between the first three Counts. The criminal conduct of the Accused in respect of the first three Counts, is fully, and most appropriately reflected in Count 3, and the interests of justice and the purposes of punishment will be fully satisfied if a conviction is entered only in respect of Count 3, and not in respect of Counts 1 and 2.

452. The issue of cumulation also arises in relation to the remaining offences charged in the Indictment. These are devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5), and destruction or wilful damage of cultural property (Count 6). The statutory basis and the elements of each of these offences have been set out earlier in this decision. The elements of each of these three offences are such that they each, on a theoretical basis, contain "materially" distinct elements from each other.

453. The offence of attacks on civilian objects requires proof of an attack, which is not required by any element of either the offence of devastation not justified by military necessity or the offence of destruction of or wilful damage to cultural property. The offence of destruction of or wilful damage to cultural property requires proof of destruction or wilful damage directed against property which constitutes the cultural or spiritual heritage of peoples, which is not required by any element of the offence of attacks on civilian objects or the offence of devastation not justified by military necessity. The offence of devastation not justified by military necessity requires proof that the destruction or damage of property (a) occurred on a large scale and that (b) was not justified by military necessity. What is required by one offence, but not required by the other offence, renders them distinct in a material fashion.

454. In the present case, however, the offences each concern damage to property caused by the JNA artillery attack against the Old Town of Dubrovnik on 6 December 1991. The entire Old Town is civilian and cultural property. There was large scale damage to it. There was no military justification for the attack. In the view of the Chamber, given these particular circumstances, the essential criminal conduct is directly and comprehensively reflected in Count 6, destruction or wilful damage to cultural property. Counts 4 and 5 really add no materially distinct element, given the particular circumstances in which these offences were committed. The criminal conduct of the Accused in respect of these three Counts, is fully, and most appropriately reflected in Count 6, and the interests of justice and the purposes of punishment will be fully satisfied if a conviction is entered only in respect of Count 6, and not in respect of Counts 4 and 5.

455. For these reasons, in the particular circumstances in which these offences were committed, the Chamber will enter convictions against the Accused only in respect of Count 3, attacks on civilians, and Count 6, destruction and willful damage of cultural property.

**B. Concurrent responsibility under Articles 7(1) and 7(3) of the Statute**

456. In the present case the Prosecution has only established the Accused's guilt on the basis of his responsibility as a superior under Article 7(3) of the Statute. It has not been proved that the Accused ordered or aided and abetted the offences charged under Article 7(1) of the Statute. No issue arises, therefore, of concurrent responsibility under Articles 7(3) and 7(1).

## IX. SENTENCING

457. The Prosecution has submitted that the Accused, if convicted on all counts, should receive a sentence of imprisonment of between thirteen and fifteen years.<sup>1286</sup>

458. Article 24 of the Statute and Rule 101 of the Rules govern sentencing. Article 24 (2) of the Statute provides that a Chamber “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person”.<sup>1287</sup> Rule 101 (B) requires that aggravating and mitigating circumstances as well as the general practice regarding prison sentences in the courts of the former Yugoslavia be taken into account,<sup>1288</sup> although the Chamber is not bound by the latter.<sup>1289</sup> The primary objectives of sentencing have been identified by the Appeals Chamber as retribution and deterrence.<sup>1290</sup> The former aims at imposing a just and appropriate punishment for a particular offence,<sup>1291</sup> while the latter seeks to ensure that the penalty imposed dissuade the Accused and others from committing similar offences.<sup>1292</sup>

### **A. The gravity of the offence**

459. The gravity of the offence is a factor of paramount importance in the determination of sentence.<sup>1293</sup> Sentences must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and

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<sup>1286</sup> Prosecution Final Brief, para 347.

<sup>1287</sup> Article 24 of the Statute provides “1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. 3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”

<sup>1288</sup> Rule 101 of the Rules provides: “(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life. (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

<sup>1289</sup> *Krstić* Appeals Judgement, para 260; *Blaškić* Appeals Judgement, para 682, referring to the *Kunarac* Trial Judgement, para 829.

<sup>1290</sup> *Čelebići* Appeals Judgement, para 806; *Aleksovski* Appeals Judgement, para 185. Other, less dominant objectives, include the promotion of legal awareness, public reprobation and rehabilitation. See *Blaškić* Appeals Judgement, para 678; *Čelebići* Appeals Judgement, para 806. Nevertheless, it is the “individual guilt of an accused limits the range of the sentence.” See *Stakic* Trial Judgement, para 899; *Nikolić*, Sentencing Judgement, para 123.

<sup>1291</sup> *Todorović* Sentencing Judgement, para 29; *Nikolić* Sentencing Judgement, para 140.

<sup>1292</sup> *Todorović* Sentencing Judgement, para 30.

<sup>1293</sup> *Aleksovski* Appeals Judgement, para 182; *Čelebići* Appeals Judgement, para 731; *Blaškić* Appeals Judgement, para 683.

degree of the participation of the accused.<sup>1294</sup> In this regard, the Chamber notes the jurisprudence of the Tribunal that war crimes are not inherently less serious than crimes against humanity.<sup>1295</sup>

460. In the present case, the Prosecution submits that the gravity of the crimes is characterised by the fact that the “civilians and civilian objects were defenceless in face of the firepower of the JNA’s 2<sup>nd</sup> OG forces”,<sup>1296</sup> and that the shelling resulted in “long-term physical, psychological and emotional suffering of the victims”,<sup>1297</sup> “extensive damage to many, many homes”<sup>1298</sup> and damage to “numerous religious and educational institutions and historic monuments”.<sup>1299</sup>

461. The Chamber has found the Accused guilty of the crimes of attacks on civilians (Count 3) and destruction and wilful damage of cultural property (Count 6). It was established by the evidence that on 6 December 1991, forces under the command of the Accused deliberately and unlawfully shelled the Old Town of Dubrovnik and its civilian population, giving rise to casualties, two of them fatal.<sup>1300</sup> The same attack targeted civilian objects, causing destruction of and extensive damage to property, both civilian and cultural. It is the finding of the Chamber, as discussed earlier, that 52 buildings of the Old Town were damaged on 6 December 1991, six of which were completely destroyed. Among these damaged buildings were monasteries, churches, a mosque, a synagogue and palaces.<sup>1301</sup> The Chamber recalls in particular that the whole of the Old Town of Dubrovnik was on the UNESCO World Heritage List.

462. Also of relevance to the gravity of the offence is the form of the Accused’s participation in the commission of the crimes. In this respect, the Chamber wishes to stress that the Accused was acquitted of the charges of having ordered or aided and abetted the unlawful shelling of the Old Town of Dubrovnik.<sup>1302</sup> The evidence has not established that the Accused directly ordered the shelling of the Old Town on 6 December 1991. What he is found to have ordered is the capture of a military objective, *i.e.* Srd. While the crimes were committed in the course of this particular military operation, it was not established that the Accused’s order was intended to authorise the unlawful shelling of the Old Town of Dubrovnik. On the evidence, this unlawful shelling was conducted with the authorisation of others, not of the Accused.

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<sup>1294</sup> *Furundžija* Appeals Judgement, para 249; *Blaškić* Appeals Judgement, para 683.

<sup>1295</sup> *Tadić* Sentencing Appeals Judgement, para 69; *Furundžija* Appeals Judgement, para 247.

<sup>1296</sup> Prosecution Final Brief, para 329.

<sup>1297</sup> Prosecution Final Brief, para 330.

<sup>1298</sup> Prosecution Final Brief, para 332.

<sup>1299</sup> Prosecution Final Brief, para 333.

<sup>1300</sup> See *supra*, paras 214; 250; 259; 414.

<sup>1301</sup> See *supra*, para 318.

<sup>1302</sup> See *supra*, paras 348; 356.

463. The criminal liability of the Accused in this case is based on the finding of the Chamber that, while he, as the commander of the 2 OG, was able to prevent the unlawful shelling of the Old Town on 6 December 1991, to put an end to that shelling while it was occurring, to investigate or take administrative and disciplinary action against the officers who directly participated in, or who failed to prevent or stop that shelling, the Accused did not take any of the measures available to him to do so.

464. The Chamber further notes that Admiral Jokić pleaded guilty to the same charges as the Accused, and acknowledged his responsibility for having aided and abetted the unlawful shelling of the Old Town (Article 7(1) of the Statute) as well as his responsibility as commander of the 9 VPS (Article 7(3) of the Statute) for his failure to prevent such shelling or punish the perpetrators thereof. On this basis, Admiral Jokić was sentenced to seven years imprisonment.<sup>1303</sup> There is no doubt that the Accused's position as a commander at a very high level in the JNA command structure, reporting directly to the Federal Secretariat of Defence,<sup>1304</sup> serves to emphasize the seriousness of his failure to prevent the shelling and to punish the perpetrators, *i.e.* his failure to exercise his authority in accordance with the laws of war. Nevertheless, when it comes to determining an appropriate sentence for the Accused, the Chamber also keeps in mind that Admiral Jokić, as the Accused's immediate subordinate, had direct command and responsibility over the forces involved in the unlawful shelling of the Old Town. While the Accused's responsibility for his failure to act as the superior commander of the forces involved is clearly established by the evidence, it remains the case that he was more remotely responsible than Admiral Jokić. Further, the Accused is convicted only pursuant to Article 7(3) of the Statute. It is the case, however, that Admiral Jokić entered a guilty plea.

## **B. Aggravating and mitigating circumstances**

465. The Statute and the Rules do not attempt to exhaustively define aggravating and mitigating factors. Rule 101(B) lists only an accused's substantial cooperation with the Prosecutor as a mitigating circumstance. The jurisprudence has identified additional factors which a Chamber may take into account.<sup>1305</sup> These are not exhaustive. The Chamber must weigh the circumstances of

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<sup>1303</sup> Admiral Jokić has appealed against the Sentencing Judgement, arguing that the Trial Chamber erred in finding him responsible for aiding and abetting on the basis of conduct with which he had not been charged, *i.e.* acts and omissions *before* 6 December 1991. Admiral Jokić submits that his sentence should therefore be adjusted, which the Prosecution conceded. *See Prosecutor v. Jokić*, Appellant's Brief Pursuant to Rule 111, Case No IT-42/1-A, 30 June 2004; *See also*, Prosecution Final Brief, para 345.

<sup>1304</sup> *See* Exhibit P204, pp 7 and 28.

<sup>1305</sup> *Blaškić Appeals Judgement*, paras 686 and 696.

each particular case to identify aggravating and mitigating circumstances and assess the weight to be accorded thereto.<sup>1306</sup>

466. Aggravating circumstances must be directly related to the commission of the offence,<sup>1307</sup> and must be established beyond a reasonable doubt.<sup>1308</sup> The exercise of the Accused of his right to remain silent, and not to testify, does not constitute an aggravating circumstance.<sup>1309</sup> Mitigating circumstances may be taken into account regardless of whether they are directly related to the alleged offence,<sup>1310</sup> and are to be determined on a balance of the probabilities.<sup>1311</sup>

467. In the present case, the Prosecution submits that relevant mitigating circumstances include the “voluntary surrender of the Accused; his compliance with the conditions of provisional release; his good character with no prior criminal convictions; his comportment in detention; his character subsequent to the conflict; his age; and his poor health.”<sup>1312</sup> The Defence further submits that the Accused did not take an active part in the events<sup>1313</sup> (but this is advanced, mainly, on the faulted factual basis that the events were carried out against his orders and without his knowledge) and that casualties and damage occurred on a far lesser scale than in other cases brought before the Tribunal.<sup>1314</sup> Further mitigating factors relied on by the Defence include the regrets expressed by the Accused on the day after the attack,<sup>1315</sup> his voluntary surrender to the Tribunal,<sup>1316</sup> his age,<sup>1317</sup> family situation,<sup>1318</sup> good character<sup>1319</sup> and poor health,<sup>1320</sup> in particular in view of the expected decline of his mental abilities.<sup>1321</sup>

468. First, the Chamber takes into consideration the personal circumstances of the Accused. Mrs Katica Strugar, the Accused’s wife, and Lieutenant-Colonel Renko have both testified as to the good character of the Accused and his respect for individuals regardless of their ethnic origin. Lieutenant-Colonel Renko described him as a man of firm, yet humane nature, who likes to help people and respects members of all ethnic groups,<sup>1322</sup> and as a commander held in high esteem

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<sup>1306</sup> *Čelebić* Appeals Judgement, paras 777; 780; *Blaškić* Appeals Judgement, para 685.

<sup>1307</sup> *Kunarac* Trial Judgement, para 850; *Stakić* Trial Judgement, para 911.

<sup>1308</sup> *Čelebić* Appeals Judgement, para 763; *Blaškić* Appeals Judgement, paras 686.

<sup>1309</sup> *Čelebić* Appeals Judgement, para 783; *Blaškić* Appeals Judgement, para 687.

<sup>1310</sup> *Stakić* Trial Judgement, para 920.

<sup>1311</sup> *Blaškić* Appeals Judgement, para 697.

<sup>1312</sup> Prosecution Final Brief, para 341.

<sup>1313</sup> Defence Final Brief, para 545.

<sup>1314</sup> Defence Final Brief, para 546.

<sup>1315</sup> Defence Final Brief, para 547.

<sup>1316</sup> Defence Final Brief, para 549.

<sup>1317</sup> Defence Final Brief, para 548.

<sup>1318</sup> Defence Final Brief, para 550.

<sup>1319</sup> Defence Final Brief, para 551.

<sup>1320</sup> Defence Final Brief, para 552-562.

<sup>1321</sup> Defence Final Brief, para 557.

<sup>1322</sup> Lieutenant-Colonel Renko, T 8018; Katica Strugar, T 8035.

because he listened to his subordinates<sup>1323</sup> and cared about individual soldiers and officers.<sup>1324</sup> The Chamber accepts this evidence without reservation. Mrs Strugar, a woman of Serbian and Croatian background,<sup>1325</sup> stated that their different ethnic backgrounds were never an obstacle to their life together.<sup>1326</sup> She portrayed her husband as a good husband and father who always tried hard to keep the family together although they were forced to move frequently due to his service with the JNA.<sup>1327</sup>

469. In the view of the Chamber, the Accused's personal and family circumstances clearly warrant some mitigation of the sentence that would otherwise be appropriate. The Accused is 71 years old and in poor health; he suffers in particular from some degree of vascular dementia and depression and experiences memory losses. The Accused's wife, with whom he has been married for 47 years and has two sons,<sup>1328</sup> is also in poor health. In particular, she experiences severe vision problems as a result of which she is becoming increasingly dependent on others. She can no longer live on her own<sup>1329</sup> and needs an escort to walk.<sup>1330</sup> She is currently forced to stay most of the time with either one of her two sons in Belgrade,<sup>1331</sup> both of whom are unemployed.<sup>1332</sup> In these circumstances, the Chamber is of the view that the absence of the Accused while serving his sentence will be a particular hardship for his wife even though she is receiving some assistance from others. It is satisfied that concern for his wife's well-being will also make the period spent in custody particularly difficult for the Accused.

470. Turning to the Defence submission that the Accused expressed his regret on the day after the attack, the Chamber notes that a sincere expression of regret may constitute a mitigating circumstance, even in the absence of any admission of participation in a crime.<sup>1333</sup> In the present case, there is evidence that the Accused expressed his regret in a letter to Minister Rudolf on the day after the attack.<sup>1334</sup> In light of the circumstances at the time, however, in particular the ongoing negotiations with the Croatian representatives, the role of the Accused in the attack on Srd, and his failure to investigate and punish the perpetrators of the crimes, the Chamber is not able to accept that this letter was an expression of sincere remorse.

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<sup>1323</sup> Lieutenant-Colonel Renko, T 8020.

<sup>1324</sup> Lieutenant-Colonel Renko, T 8022-8023.

<sup>1325</sup> Katica Strugar, T 8035.

<sup>1326</sup> Katica Strugar, T 8031.

<sup>1327</sup> Katica Strugar, T 8032-8034.

<sup>1328</sup> Katica Strugar, T 8033.

<sup>1329</sup> Katica Strugar, T 8037; 8040-8041.

<sup>1330</sup> Katica Strugar, T 8038.

<sup>1331</sup> Katica Strugar, T 8040-8041.

<sup>1332</sup> Katica Strugar, T 8041.

<sup>1333</sup> Vasiljević Appeals Judgement, para 177.

471. After the closing arguments of the parties, however, the Accused asked to be allowed to make a statement to the Chamber. He stated in particular:

I am genuinely sorry for all human casualties and for all the damage caused. I am genuinely sorry all the victims, for all the people who were killed in Dubrovnik, as well as for all those young soldiers who were killed on Srd as well as in other areas and positions. I am sorry that I was unable to do anything to stop and prevent all that suffering.<sup>1335</sup>

The Chamber accepts the sincerity of this statement although it takes a different position from the Accused with respect to the last sentence.

472. The voluntary surrender of an Accused to the Tribunal is also relevant for the purposes of mitigation.<sup>1336</sup> In the present case, the Chamber notes that the Accused surrendered voluntarily to the Tribunal on 4 October 2001. The Chamber further notes that the Accused complied with the conditions set for his provisional release, although his appearance for the start of his trial was delayed about a week, apparently due to reasons of ill health. Further, the Chamber has no reason to doubt the parties' submission with respect to the Accused's good conduct during his detention at the UNDU.

### C. The general practice in the courts of the former Yugoslavia

473. In determining the appropriate sentence, the Chamber must consider the general sentencing practice in the former Yugoslavia. It is however not bound by such practice<sup>1337</sup> and can impose a sentence in excess of that which would be applicable under the relevant law in the former Yugoslavia.<sup>1338</sup> The Chamber first notes that the factors to be taken into consideration for the purpose of sentencing in the former Yugoslavia are enshrined in Article 41(1) of the SFRY Criminal Code which entered into force on 1 July 1977.<sup>1339</sup>

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<sup>1334</sup> Minister Rudolf testified that on 7 December 1991, he received a letter from the Accused in a blue envelope in which the Accused expressed his regrets over the events of the day before, T 5612-5613; 5615. The letter itself is not in evidence.

<sup>1335</sup> Statement of the Accused, T 8808.

<sup>1336</sup> *Blaškić Appeals Judgement*, para 696.

<sup>1337</sup> *Čelebići Appeals Judgement*, paras 813; 816; *Kunarac Appeals Judgement*, para 377 ; *Jelisić Appeals Judgement*, paras 116-117 ; *Blaškić Appeals Judgement*, para 681-682, referring to the *Kunarac Trial Judgement*, para 829: "Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia."

<sup>1338</sup> *Čelebići Appeals Judgement*, para 816-817; *Blaškić Appeals Judgement*, para 681.

<sup>1339</sup> Article 41(1) of the SFRY Criminal Code states: "The court shall determine the sentence for the perpetrator of a given crime within the limits prescribed by the law for this crime, bearing in mind the purpose of the punishment and taking into account all the circumstances that could lead to this sentence being more or less sever, in

474. With regard to the sentence which could have been imposed on the Accused by the courts in the former Yugoslavia, the Chamber refers to Articles 142 (“War Crime Against the Civilian Population”)<sup>1340</sup>, 148 (“Making Use of Prohibited Means of Warfare”)<sup>1341</sup> and 151 (“Destruction of Cultural and Historical Monuments”)<sup>1342</sup> of the SFRY Criminal Code. Articles 38(1) and 38(2) of the SFRY Code are also of relevance insofar as they provide for a maximum sentence of 15 years imprisonment subject to the provision that if a criminal offence attracts the death penalty, the court may impose a longer sentence of 20 years of imprisonment. By virtue of the above, the crimes against persons of which the Accused has been found guilty would have been punishable in the former Yugoslavia by sentences ranging from 5 to 20 years of imprisonment, and the crimes against property by sentences ranging from 1 to 15 years of imprisonment.

475. The Chamber notes that these provisions do not deal specifically with the sentence of a commander for his failure to act. However, paragraph 21 of the Instructions on the Application of International Laws of War in the Armed Forces of SRFY,<sup>1343</sup> read together with Article 24(1) of the SFRY Criminal Code,<sup>1344</sup> appear to allow for a commander who failed to act to prevent or punish a crime to be sentenced as if he had committed the crime himself.

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particular: the degree of criminal responsibility, the motives of the crime, the degree of the threat or damage to protected property, the circumstances under which the crime was committed, the background of the perpetrator, his personal circumstances and behavior after the commission of the crime as well as other circumstances which related to the character of the perpetrator.” (unofficial translation).

<sup>1340</sup> Article 142 of the SFRY Criminal Code provides: “(1) Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack against the civilian population, settlement, individual civilians or persons *hors de combat*, as a consequence of which death has occurred or serious bodily harm or grave impairment of health; indiscriminate attack affecting civilian population; or killings, tortures or inhumane treatment of the civilian population [...] unlawful and arbitrary destruction or large-scale appropriation of property not justified by military necessity [...] shall be punished by no less than five years in prison or by death penalty. (2) The punishment provided for in Paragraph 1 herein shall be applied to whomever, in violation of international law in time of war, armed conflict or occupation, orders an attack to be launched against objects protected by international law [...]; orders indiscriminate attack against civilian objects under special protection of international law, undefended areas and demilitarised zones [...].” (unofficial translation).

<sup>1341</sup> Article 148 of the SFRY Criminal Code provides: “(1) Whoever orders the use of means or practices of warfare prohibited by international law in time of war or armed conflict, or whoever makes use of such means and practices shall be punished by no less than one year in prison. (2) If more persons have been killed as a result of the offence referred to in Paragraph 1 herein, the perpetrator shall be punished by no less than five years in prison or by death penalty.” (unofficial translation).

<sup>1342</sup> Article 151 of the SFRY Criminal Code provides: “(1) Whoever, in violation of international law in time of war or armed conflict, destroys cultural or historical monuments and buildings or institutions dedicated to science, art, education or humanitarian purposes, shall be punished by no less than one year in prison. (2) If by commission of offence referred to in Paragraph 1 herein, a building clearly distinguished as being under special protection of international law as part of the cultural and spiritual heritage of peoples has been destroyed, the perpetrator shall be punished by no less than five years of prison.” (unofficial translation).

<sup>1343</sup> Exhibit P189. Paragraph 21 reads as follows: “An officer shall be answerable as an accomplice or instigator if by failure to take action against his subordinate who violate the laws of war, he contributes to the repeated commission of such acts by units or individuals subordinated to him.” (unofficial translation).

<sup>1344</sup> Paragraph 24(1) of the SRFY Criminal Code reads as follows: “Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced.” (unofficial translation).

**D. Credit for time served in custody**

476. Pursuant to Rule 101(C) of the Rules, the Accused is entitled to credit for the time spent in detention pending and during his trial, namely 457 days as of the date of issuance of this judgement.

## X. DISPOSITION

477. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:

478. The Chamber finds the Accused **guilty** pursuant to Article 7(3) of the Statute of the following two counts:

**Count 3:** Attacks on civilians, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

**Count 6:** Destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works or art and science, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

479. While the Chamber is satisfied that the elements of the following four counts have been established pursuant to Article 7(3) of the Statute, for reasons given earlier the Chamber does **not** record a finding of guilty against the Accused in respect of:

**Count 1:** Murder, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

**Count 2:** Cruel Treatment, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

**Count 4:** Devastation not justified by military necessity, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

**Count 5:** Unlawful Attacks on Civilian Objects, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

480. The Chamber does **not** find the Accused guilty pursuant to Article 7(1) of the Statute in respect of any of the six Counts.

481. The Chamber hereby sentences the Accused to a single sentence of eight years of imprisonment.

482. The Accused has been in custody for 457 days. Pursuant to Rule 101(C) of the Rules, he is entitled to credit for time spent in detention so far.

483. Pursuant to Rule 103(C) of the Rules, the Accused shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

Done in English and French, the English text being authoritative.

Dated this thirty-first January 2005  
At The Hague  
The Netherlands

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Judge Kevin Parker  
Presiding

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Judge Krister Thelin

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Judge Christine Van Den Wyngaert

**[Seal of the Tribunal]**

## ANNEX I: DESTROYED OR DAMAGED BUILDINGS OR STRUCTURES<sup>1345</sup>

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 1</b>	<b>A 1/A 92<sup>1346</sup></b>	31/439	The Arsenal (city walls) with the Cinema and Café <sup>1347</sup>
<b>J 2</b>	<b>A 2</b>	26/35/36 <sup>1348</sup>	Vrata Od Pila (City gate, Pile) and fortification at Pile <sup>1349</sup>
<b>J 3</b>	<b>A 3</b>	43	Stradun <sup>1350</sup>
<b>J 4</b>	<b>A 4</b>	44-52 <sup>1351</sup>	Complex of Franciscan Monastery and Church, HQs of ICRC <sup>1352</sup>
<b>J 5</b>	<b>A 5</b>	53	Franciscan Monastery-Bell Tower <sup>1353</sup>
<b>J 6</b>	<b>A 6</b>	54	The Church of St. Saviour <sup>1354</sup>
<b>J 7</b>	<b>A 7</b>	57	Public fountain (Onofrio Fountain) <sup>1355</sup>

<sup>1345</sup> A graphic display of destroyed or damaged buildings and structures can be found in Annex I.A.

<sup>1346</sup> The objects were merged, because both relate to the parts of Arsenal. *See also* Exhibit C1/1, pp 19-21.

<sup>1347</sup> Slobodan Vuković, T 5989-5990; Exhibit P61/39, paras 12, 16-17; P145 (at 20:13, 20:26, 20:33-20:36).

<sup>1348</sup> The objects were merged, because all three list the area of Pile, *i.e.* Pile gate and fortification at Pile. The Chamber finds it unnecessary to keep these different parts of Pile separately, because most of the evidence does not make this distinction.

<sup>1349</sup> Nikola Jović, T 3033-3034; Slobodan Vuković, T 5830; 5920; 5958-5959; Exhibit P61/39, para 12; Exhibit P63/6, p 37; Exhibit P66 (at 37.34-37.40), Exhibit P145 (at 14.58-15.03, 15.25); Exhibit P178.

<sup>1350</sup> Witness A, T 3705; Đelo Jusić, T 3265; Exhibit P78 (at 16:43; 16:53); Nikola Jović, T 3033; Ivan Mustać, T 1475; Minister Rudolf, T 5619; Slobodan Vuković, T 5932-5933; 5826-5827; Exhibit P145 (at 00:58-01:04; 02:54); Exhibit P61/39, para 2; Exhibit P164, p 2; Lucijana Peko, T 1967; Slavko Grubišić, T 1039-1040.

<sup>1351</sup> The objects were merged, because each of them lists only a certain part of the same complex. The Chamber finds it unnecessary to keep these different parts of the Monastery separately, because most of the evidence does not make this distinction.

<sup>1352</sup> Slavko Grubišić, T 1046; Đelo Jusić, T 3076, 3080, 3100-3102; Exhibit P78 (at 33:50-40:10; 40:45-40:56; 41:54-42:58); Ivan Mustac, T 1475; Nikola Jović, T 3033; Lars Brolund, T 879-880; Lucijana Peko, T 1870-1872; T 1940-1941; Exhibit P52; Exhibit P212; Exhibit P145 (at 05:14-06:15; 07:10-08:17; 09:07-09:11; 10:18-10:44; 16:36); Exhibit P61/39, para 7; Exhibit P63/6, pp 16, 18 (photo no. 35, 01848522); Exhibit P164, p 2; *See also* Exhibit C1/1, p 23.

<sup>1353</sup> Delo Jusić, T 3090; also Exhibit P80 at T 3122; Exhibit P78 (at 15:47-15:54; 16:18-16:23; 18:25-18:31; 37:55-38:00; 24:56-25:05); Exhibit P145 (at 16:53); Slobodan Vuković, T 5962; Exhibit P52; Exhibit P212 (I-10); Exhibit P61/39, para 9.

<sup>1354</sup> Lucijana Peko, T 1904-08; Exhibit P52; Exhibit P212 (I-11); Exhibit P63/6, p 13 (photo no. 3, 01848492).

<sup>1355</sup> Slavko Grubišić, T 1046; Ivo Vlašica, T 3326; Nikola Jović, T 3033; Lars Brolund, T 880; Exhibit P145 (at 04:59; 05:13); Exhibit P66 (at 35:58); Slobodan Vuković, T 5940; Đelo Jusić, T 3123; Exhibit P82; Exhibit P63/6, p 13 (photo no. 54, 01848535); Exhibit P61/39, para 6; *See also* Exhibit C1/1, p 21; Exhibit C1/2, buildings A7 and A34.

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 8</b>	<b>A 8</b>	70	Complex of Sigurata Monastery <sup>1356</sup>
<b>J 9</b>	<b>A 9<sup>1357</sup></b>	241	<i>Palace - Od Sigurate 2</i> <sup>1358</sup> (Residential, Block Placa - Antuninska Street - Prijeko-Palmotićeva Street 2) <sup>1359</sup>
<b>J 10</b>	<b>A 10</b>	244	<i>Palace- Od Sigurate 1 (Festival Palace)</i> (Commercial, Block Placa -Od Sigurate- Prijeko- C. Medović Street 1) <sup>1360</sup>
<b>J 11</b>	<b>A 11<sup>1361</sup></b>	247	<i>Palace - Od Puča 16</i> (Residential, Od Puča 16) <sup>1362</sup>
<b>J 12</b>	<b>A 13</b>	293/319 <sup>1363</sup>	Držićeva Poljana Cathedral <sup>1364</sup>
<b>J 13</b>	<b>A 14</b>	298	St. Vlaho Church (St. Blaise Church) <sup>1365</sup>
<b>J 14</b>	<b>A 18</b>	303/304 <sup>1366</sup>	Residential business, Između Polača 10 <sup>1367</sup>

<sup>1356</sup> Slavko Grubišić, T 1045, 1051, 1097, 1104; Exhibit P30 (“9”); Exhibit D14 (damage to the roof); Exhibit P164, p 2; See also Exhibit C1/1, pp 17, 19; Exhibit C1/2, building A8.

<sup>1357</sup> The Chamber notes that Prosecution in their Final Brief has indicated that A9 is located on Od Puča 16 (para 187 and fn 413), thereby confusing this object with A11 (para 185 and fn 408). However, it has made a correct marking of both buildings on the map annexed to its Brief (Annex IV). The Chamber accepts the Prosecution marking on the map as an authoritative submission.

<sup>1358</sup> Where the Chamber has identified a building in the Schedule, which is also mentioned in para 23 of the Indictment as one of the six destroyed or burned out buildings, it is emphasised in *italics*.

<sup>1359</sup> Ivan Mustac, T 1474, 1479; Lucijana Peko, T 1966; Đelo Jusić, T 3088; Zineta Oresta, T 3472-3474, 3477-3480, 3482-3483; Exhibits P87 and P88); Slobodan Vuković, T 5825-5826, 5917, 5937-5939; markings on Exhibit P39 (“B”), Exhibit P81 (“i”), Exhibit P89 (“X”); Exhibit P66 (at 35.52, 36.34, 36.44), Exhibit P78 (at 24.00-24.35); Exhibit P145 (at 03.27-03.42); Exhibit P63/9, pp 10-11; Exhibit P90.

<sup>1360</sup> Ivan Mustac, T 1474; Slavko Grubišić, T 1036-1037; Đelo Jusić, T 3076, 3086; Nikola Jović, T 2952; Ivo Grbić, T 1375, 1377; Đorđe Čiganović, T 2735; Zineta Oresta, T 3473, 3477-3480; Exhibits P87 and P88; Slobodan Vuković, T 5825-5826, 5913-5914; markings on Exhibit P39 (“B”), Exhibit P75 (“G”), Exhibit P81 (“H”); Exhibit P66 (at 36.40), Exhibit P78 (at 23.36-24.03); Exhibit P145 (at 12.00-12.50); See also Exhibit C1/1, p 17; Exhibit C1/2, building A10.

<sup>1361</sup> See *supra*, footnote 1357.

<sup>1362</sup> Ivo Grbić, T 1360-69; 1377 (see also Exhibits P34-P38); Lucijana Peko, T 1966; Slavko Grubišić, T 1040; Đelo Jusić, T 3083-3084 (P81 (“E”); T. 3091; P78 (at 26:16-27:24); Ivan Mustac, T 1474 (P39 (“E”), T 1481; Slobodan Vuković, T 5832-33, 5864; 6107-08; P145 (at 13:04-05; 13:12), T 5949; P178 (“11”); P63/6 (photo no. 29, 01848516); See also Exhibit C1/1, p 18; Exhibit C1/2, building A11.

<sup>1363</sup> The objects were merged, because both entries in Schedule II list “Držićeva Poljana Cathedral”.

<sup>1364</sup> Slavko Grubišić, T 1043-44; Ivan Mustac, T 1475, 1482; P174 (X-1); Slobodan Vuković, T 5830, 5889-90; P66 (36:38), T 5918; P52; P212; P61/39, para 19; P63/6, p 37.

<sup>1365</sup> Đelo Jusić, T 3076; P78 (at 15:56-16:03, 16:27-16:40, 18:11); Slavko Grubišić, T 1044; Mato Vajalo, T 2002; Ivan Mustac, T 1475, 1482; Exhibit P66 (at 35:46), T 5913; Exhibit P145 (at 00:21; 00:25; 00:38; 00:51-53; 00:56), T 5931-5932; Exhibit P63/6, pp 13, 37; Exhibit P61/39, para 1; Exhibit P164, p 2; See also Exhibit C1/1, p 20; Exhibit C1/2, building A14.

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 15</b>	<b>A 23</b>	309	Business, Izmedu Polača 5 <sup>1368</sup>
<b>J 16</b>	<b>A 28</b>	314	Serbian Orthodox Church <sup>1369</sup>
<b>J 17</b>	<b>A 31</b>	317	Residential business, Između Polača <sup>1370</sup>
<b>J 18</b>	<b>A 35</b>	323	Residential, 2 Gundulićeva Poljana (The Katić Palace) <sup>1371</sup>
<b>J 19</b>	<b>A 39</b>	328	Mosque <sup>1372</sup>
<b>J 20</b>	<b>A 57</b>	346	<i>Palace Sorkocević – Miha Pracata 6</i> (Residential - commercial, 6 Miha Pracata Street) <sup>1373</sup>
<b>J 21</b>	<b>A 59</b>	348/295 <sup>1374</sup>	<i>Palace - Od Puča 11</i> (Residential - commercial, Od Puča Street 11) <sup>1375</sup>
<b>J 22</b>	<b>A 70</b>	359	Residential, Od Domina Street 9 <sup>1376</sup>
<b>J 23</b>	<b>A 74</b>	363	Residential, Od Domina Street 1 <sup>1377</sup>

<sup>1366</sup> The objects were merged, because both entries in Schedule II list Izmedu Polača 10.

<sup>1367</sup> Witness A, T 3625; Exhibit P95 and photo P96 (“A”); Exhibit P98, T 3627-3628; 3634; 3637-3639; Exhibit P97; Exhibit P174 (IX-7); Slobodan Vuković, T 6088-6089.

<sup>1368</sup> P174 (IX-15); Slobodan Vuković, T 5881-5882; *See also* Exhibit C1/1, pp 20, 22; Exhibit C1/2, buiding A23.

<sup>1369</sup> Slavko Grubišić, T 1043; Đelo Jusić, T 3094, Exhibit P78 (at 29:25-29:39, 29:50); Exhibit P174 (IX-20); Slobodan Vuković, T 6096-6097; Exhibit P63/6, photo no. 35, 01848522; Captain Pepić, T 7540.

<sup>1370</sup> Ivan Mustać, T 1474, 1480, Exhibit P39 (“C”); Exhibit P174 (IX-24); Exhibit P145 (at 17:56-17:58), Slobodan Vuković, T 5965-5966; *See also* Exhibit C1/1, p 20; Exhibit C1/2, buiding A31.

<sup>1371</sup> Exhibit P52; Exhibit P212 (X-5); Exhibit P174; Slobodan Vuković, T 5893-5896; *See also* Exhibit C1/2, buiding A35.

<sup>1372</sup> Exhibit P52; Exhibit P212 (X-10); Exhibit P174; Slobodan Vuković, T 5890-5891, T 6100-6102; *See also* Exhibit C1/1, p 22.

<sup>1373</sup> Lucijana Peko, T 1966; Nikola Jović, T 3030-3031, 2937, Exhibit P75 (“D”), T 2960; Đelo Jusić, T 3097; Exhibit P78 (at 32:09-32:36); Ivan Mustac, T 1474; Exhibit P174 (XI-15); Slobodan Vuković, T 5884-5886, 6102-6107, Exhibit P178 (“6”); Exhibit P63/6 (photos nos 32 and 33, 01848519 and 01848520); *See also* Exhibit C1/1, p 22; Exhibit C1/2, building A57.

<sup>1374</sup> The objects were merged, because both entries in Schedule II list Od Puča Street 11.

<sup>1375</sup> Ivan Mustać, T 1474-1475; Đelo Jusić, T 3096; Nikola Jović, T 2952, 2961; Ivo Grbić, T 1376; Slobodan Vuković, T 5949-5953, 6052-6053, 6110-6115; markings on Exhibit P39 (“F”), Exhibit P75 (“E”); Exhibit P78 (at 29.54-31.10); Exhibit P145 (at 13.23-14.39); Exhibit P174 (XI-17); *See also* Exhibit C1/1, p 22; Exhibit C1/2, buiding A59.

<sup>1376</sup> Exhibit P174 (XI-29); Slobodan Vuković, T 5896-5898.

<sup>1377</sup> Exhibit P174 (XI-33); Slobodan Vuković, T 5888-5889.

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 24</b>	<b>A 75</b>	364	Domino Church <sup>1378</sup>
<b>J 25</b>	<b>A 77</b>	366	Residential - commercial, Široka Street 5 <sup>1379</sup>
<b>J 26</b>	<b>A 78</b>	367	<i>Palace Martinusic – Sv. Josipa I</i> (Residential - commercial, St. Josip Street 1) <sup>1380</sup>
<b>J 27</b>	<b>A 79</b>	368	Church of St. Joseph <sup>1381</sup>
<b>J 28</b>	<b>A 84</b>	390	St. Roko Church <sup>1382</sup>
<b>J 29</b>	<b>A 91</b>	429	Luka Sorkočević Music Education Centre <sup>1383</sup>
<b>J 30</b>	<b>A 94</b>	442	Sponza Palace <sup>1384</sup>
<b>J 31</b>	<b>A 95</b>	444	Dominican Monastery <sup>1385</sup>
<b>J 32</b>	<b>A 96</b>	446	Annunciation Church <sup>1386</sup>
<b>J 33</b>	<b>B 1</b>		Old City Port <sup>1387</sup>

<sup>1378</sup> Slavko Grubišić, T 1040-1041, Exhibit P30 (“4.”); Exhibit P174 (XI-34); Exhibit P145 (12:56), Slobodan Vuković, T 5947-5949; Exhibit P178 (“10”).

<sup>1379</sup> Lucijana Peko, T 1966; Slavko Grubišić, T 1042-43; Ivo Grbić, T 1376-77; Delo Jusić, Exhibit P78 (27:35-28:31); Exhibit P81 (“K”), T 3092-3093; Exhibit P174 (XI-36); Slobodan Vuković, T 5869; Exhibit P63/6, p 27.

<sup>1380</sup> Slavko Grubišić, T 1042-1043; Ivo Grbić, T 1376-1377; Ivan Mustac, T 1481 ; Exhibit P39 (“G”); Delo Jusić, T 3093-3094, 3098; Exhibit P81 (“L”) ; Exhibit P78 (at 29:02-29:18); Exhibit P174 (XI-37); Slobodan Vuković, T 5869, T 5915-16; Exhibit P66 (at 36:15).

<sup>1381</sup> Slavko Grubišić, T 1041-1043, Exhibit P30 (“2”); Delo Jusić, T 3098-3099, Exhibit P78 (at 33:04-33:14); Ivo Vlašica, T 3340; Exhibit P66 (at 36:50) ; Slobodan Vuković, T 5918; Exhibit P174 (XI-38); Exhibit P178 (“5”); Exhibit P63/6 (photo no. 58, 01848538); Exhibit P61/39, para 10; Exhibit P164, p 2.

<sup>1382</sup> Slavko Grubišić, T 1045, Exhibit P30 (“3”); Exhibit P164, p 2.

<sup>1383</sup> Delo Jusić, T 3107; Exhibit P78 (at 6:02; 7:25).

<sup>1384</sup> Ivan Mustac, T 1472-1473; Exhibit P145 (at 00:08) ; Slobodan Vuković, T 5930-5931; Exhibit P61/39, para 14; Exhibit P164, p 2.

<sup>1385</sup> Delo Jusić, T 3072-3074; Exhibit P78 (at 13:34-13:55); Exhibit P78 (at 14:17-14:25); Exhibit P145 (at 18:27; 18:52); Slobodan Vuković, T 5984, 5986; Exhibit P178 (“7”); Colin Kaiser, T 2463; Exhibit P63/6, p 13 (photo no. 4, 01848493); pp 17, 20 (photo no. 13, 0184850), (03073350, p 27, no. 4 b) (see also photo no. 71, 01848548), (03073354, p 31); Exhibit P61/39, para 13.

<sup>1386</sup> Exhibit P145 (at 19:30), Slobodan Vuković, T 5988; Exhibit P61/39, para 11.

<sup>1387</sup> Colin Kaiser, T 2712; Exhibit P69.

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 34</b>	<b>B 2</b>		House of Grubišić (Celestina Medovića 4) <sup>1388</sup>
<b>J 35</b>	<b>B 3</b>		Synagogue <sup>1389</sup>
<b>J 36</b>	<b>B 4</b>		Boškovićeva Street 1 <sup>1390</sup>
<b>J 37</b>	<b>B 5</b>		Boškovićeva Street 3 <sup>1391</sup>
<b>J 38</b>	<b>B 6</b>		Mr. Srhoj's, house (Od Sigurate 4 or 5) <sup>1392</sup>
<b>J 39</b>	<b>B 7</b>		Shop on the corner of Stradun and Široka <sup>1393</sup>
<b>J 40</b>	<b>B 8</b>		Building on the corner of Stradun and Cubranovićeva (Insula 8, building No 13) <sup>1394</sup>
<b>J 41</b>	<b>B 9</b>		Residential building in Zlatarićeva Street <sup>1395</sup>
<b>J 42</b>	<b>B 10</b>		Birth place of artist Ivo Vojinović (facing Stradun) <sup>1396</sup>
<b>J 43</b>	<b>B 11</b>		Building on the corner of Između Polača and Nikole Božidarevića <sup>1397</sup>
<b>J 44</b>	<b>B 12</b>		Izmedu Polača 12 (IX-13) <sup>1398</sup>

<sup>1388</sup> Slavko Grubišić, T 1022, 1038; marked as “1.” on Exhibit P30, T 1050.

<sup>1389</sup> Đelo Jusić, T 3081-3082; Exhibit P63/6, p 27, no. 19; p 37.

<sup>1390</sup> Exhibit P63/6, pp 21 and 27 (no. 18a).

<sup>1391</sup> Exhibit P63/6, p 27 (no. 18b).

<sup>1392</sup> Zineta Oresta, T 3471-3472, 3542, marked on Exhibit P89 with “A”.

<sup>1393</sup> Slobodan Vuković, T 5916-5917 (referring to it as a bookshop); Exhibit P 66 (at 36.19); Exhibit P78 (at 23.14-23.24); Colin Kaiser, T 2451; Exhibit P64; See also Exhibit C1/2, building B7.

<sup>1394</sup> Slobodan Vuković, T 5939-5940, 5954-5958, 5961-5962; Exhibit P145 (at 04.16, 15.08-15.20); marked as “15” on Exhibit P178.

<sup>1395</sup> Ivan Mustać, T 1474-1475, 1481; marked as “H” on Exhibit P39.

<sup>1396</sup> Đelo Jusić, T 3084-3085; Exhibit P78 (at 22.38-22.42, 22.48-23.00); marked with “F” on Exhibit P81; See also Exhibit C1/1, p 20; Exhibit C1/2, building B10.

<sup>1397</sup> Slobodan Vuković, T 5965; Exhibit P145 (at 17.36-17.40); See also Exhibit C1/1, p 20; Exhibit C1/2, building B11.

<sup>1398</sup> Exhibit P174 (IX-13); Slobodan Vuković, T 5870-5873, T6091-6092.

<b>Number</b>	<b>Number in Annex to Rule 98 bis decision</b>	<b>Number in Schedule II</b>	<b>Object</b>
<b>J 45</b>	<b>B 13</b>		Izmedu Polača 14 (IX-14) <sup>1399</sup>
<b>J 46</b>	<b>B 14</b>		Jadran Restaurant <sup>1400</sup>
<b>J 47</b>	<b>B 15</b>		Residential building on St. Joseph's Street (with shops on the ground floor) <sup>1401</sup>
<b>J 48</b>	<b>B 16</b>		City Bell Tower <sup>1402</sup>
<b>J 49</b>	<b>B 17</b>		Miha Pračata 4 (IX-23) <sup>1403</sup>
<b>J 50</b>	<b>B 18</b>		Nikola Jović's shop (Miha Pračata 11) <sup>1404</sup>
<b>J 51</b>	<b>B 19</b>		Lucijana Peko's house <sup>1405</sup>
<b>J 52</b>	<b>B 20</b>		Northern parts of the city walls/walkways <sup>1406</sup>

<sup>1399</sup> Exhibit P174 (IX-14); Slobodan Vuković, T5878-5881.

<sup>1400</sup> Also called Klarisa/St. Klarisa Monastery; Slobodan Vuković, T 5944-5946; Exhibit P61/39, para 8; Exhibit P145 (at 11.20-11.51, 16.01-16.07); marked as "2" on Exhibit P178.

<sup>1401</sup> Ivan Mustać, T 1481; marked with "i" on Exhibit P39 (the marking lies in fact on the corner of Od Puča and Đordićeva St., but the witness introduced it in his testimony as: "This is what we refer to as St. Joseph's Street.", T 1481).

<sup>1402</sup> Slavko Grubišić, T 1046, T 1116; Exhibit P61/39, para 15; See also Exhibit C1/2, building B16.

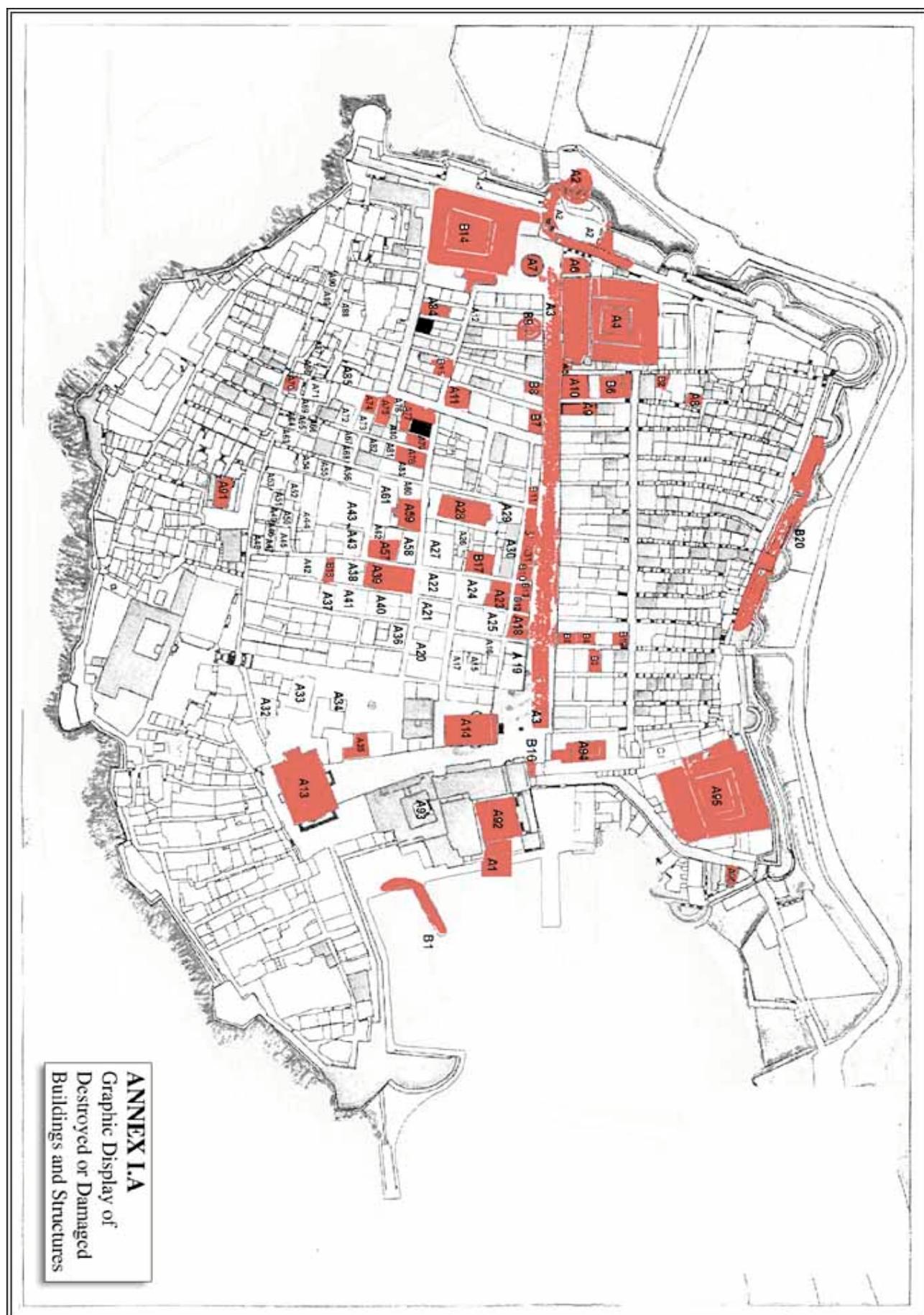
<sup>1403</sup> Slobodan Vuković, T 5883-5884; Exhibit P174 (XI-23); Exhibit P63/6, p 27, no. 29.

<sup>1404</sup> Nikola Jović, T 2926, 2954-2955, 3030-3032; marked with "A" on Exhibit P75.

<sup>1405</sup> Lucijana Peko, T 1843-1844, 1914-1917; marked with "X/A" on Exhibit P50, T 1844, 1846.

<sup>1406</sup> Accounts pointing to different parts of the city walls/walkways in the northern part of the Old Town were reviewed together, because the identification of the exact location of each part of the city wall was not possible. Slobodan Vuković, T 5963, 5988; Exhibit P61/39, para 12; Exhibit P145 (at 17.10, 20.02).

ANNEX I.A: GRAPHIC DISPLAY OF DESTROYED OR DAMAGED BUILDINGS AND STRUCTURES



## ANNEX II: GLOSSARY OF TERMS

2 OG	Second Operational Group
3/472 mtbr	Third Battalion of the 472 <sup>nd</sup> Motorised Brigade
3/5 mtbr	Third Battalion of the 5 <sup>th</sup> Motorised Brigade
107 OAG	107 <sup>th</sup> Coastal Artillery Group
9 VPS	Ninth Military Naval Sector
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977
<i>Akayesu</i> Appeals Judgement	<i>Prosecutor v. Jean-Paul Akayesu</i> , Case No. ICTR-96-4-A, Judgement, 1 June 2001
<i>Akayesu</i> Trial Judgement	<i>Prosecutor v. Jean-Paul Akayesu</i> , Case No. ICTR-96-4-T, Judgement, 2 September 1998
<i>Aleksovski</i> Appeals Judgement	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, Judgement, 24 March 2000
<i>Aleksovski</i> Trial Judgement	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-T, Judgement, 25 June 1999
<i>Banović</i> Sentencing Judgement	<i>Prosecutor v. Predrag Banović</i> , Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003
BCS	Bosnian Croatian Serbian language
<i>Blaškić</i> Appeals Judgement	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, Judgement, 29 July 2004
<i>Blaškić</i> Trial Judgement	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, Judgement, 3 March 2000
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina
<i>Brdanin</i> Trial Judgement	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-T, Judgement, 1 September 2004

Čelebići Appeals Judgement	<i>Prosecutor v. Zelnil Delalić et al</i> , Case No. IT-96-21-A, Judgement, 20 February 2001
Čelebići Trial Judgement	<i>Prosecutor v. Zelnil Delalić et al</i> , Case No. IT-96-21-T, Judgement, 16 November 1998
Chamber	Trial Chamber II of the Tribunal
Češić Sentencing Judgement	<i>Prosecutor v. Ranko Češić</i> , Case No. IT-95-10/1, Sentencing Judgement, 11 March 2004
Collins Dictionary	Collins Dictionary and Thesaurus, HarperCollins Publishers, Managing Director W. T. McLeod, 1994
Common Article 3	Article 3 of Geneva Conventions I to IV
Croatia	Republic of Croatia
Defence	Counsel for the Accused
Defence Final Brief	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, Defence Submission: Final Trial Brief, 3 September 2004
Defence Pre-Trial Brief	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-PT, Defense Pre Trial Brief, 1 October 2003
EC	European Community
ECMM	European Community Monitor Mission
Erdemović Second Sentencing Judgement	<i>Prosecutor v. Dražen Erdemović</i> , Case No. IT-96-22-Tbis, Sentencing Judgement, 5 March 1998
Furundžija Trial Judgement	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-T, Judgement, 10 December 1998
Galic Trial Judgement	<i>Prosecutor v. Stanislav Galic</i> , Case No. IT-98-29, Judgement, 5 December 2003
Geneva Accord	Geneva Accord, 23 November 1991, UN Doc. S/23239, Annex
Geneva Convention I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949

Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949
Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
<i>Hadžihasanović 98bis Decision</i>	<i>Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Case No. IT-01-47-T, Decision on Motions for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 2004
Hague Convention IV	Convention Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907
Hague Convention IX	Convention Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907
Hague Convention of 1954	Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907
<i>Hostage case</i>	Judgement of the Nuremberg Military Tribunal V, 19 February 1948, <i>United States v. Wilhelm List et al.</i>
ICRC	International Committee of the Red Cross
ICRC Commentary on the Additional Protocols	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ILC Commentary	International Law Commission Commentary on Article 6 of the Draft Code of Crimes Against The Peace and Security of Mankind, Report of the International Law Commission on the work of its 48 <sup>th</sup> session, UN doc. A/51/10
Indictment	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-PT, Third Amended Indictment, 10 December 2003

<i>Jelisić</i> Appeals Judgement	<i>Prosecutor v. Goran Jelisić</i> , Case No. IT-95-10-A, Judgement, 5 July 2001
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
<i>Jokić</i> Sentencing Judgement	<i>Prosecutor v. Miodrag Jokić</i> , Case No. IT-01-42/1-S, Sentencing Judgement, 18 March 2004
<i>Kordić</i> Appeals Judgement	<i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-A, Judgement, 17 December 2004
<i>Kordić</i> Trial Judgement	<i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-T, Judgement, 26 February 2001
<i>Krnojelac</i> Trial Judgement	<i>Prosecutor v. Milorad Krnojelac</i> Case No. IT-97-25-T, Judgement, 15 March 2002
<i>Krstić</i> Appeals Judgement	<i>Prosecutor v. Radislav Krstić</i> , Case No. IT-98-33-A, Judgement, 19 April 2004
<i>Kunarac</i> Appeals Judgement	<i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23&23/1-A, Judgement, 12 June 2002
<i>Kunarac</i> Trial Judgement	<i>Prosecutor v. Dragoljub Kunarac et al.</i> , Case No. IT-96-23/1-T, Judgement, 22 February 2001
<i>Kupreškić</i> Appeals Judgement	<i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-A, Judgement, 23 October 2001
<i>Kupreškić</i> Trial Judgement	<i>Prosecutor v. Zoran Kupreškić et al.</i> , Case No. IT-95-16-T, Judgement, 14 January 2000
<i>Kvočka</i> Trial Judgement	<i>Prosecutor v. Miroslav Kvočka et al.</i> , Case No. IT-98-30-T, Judgement, 2 November 2001
MUP	Ministry of the Interior Police
<i>Naletilić</i> Trial Judgement	<i>Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"</i> , Case No. 98-34-T, Judgement, 31 March 2003
<i>Nikolić</i> Sentencing Judgement	<i>Prosecutor v. Dragan Nikolić</i> , Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003
<i>Plavšić</i> Sentencing Judgement	<i>Prosecutor v. Biljana Plavšić</i> , Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003
Prosecution	The Office of the Prosecutor
Prosecution Final Brief	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, Prosecution's Final Trial Brief, 30 August 2004

Prosecution Pre-Trial Brief	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-PT, Prosecutor's Pre-Trial Brief Pursuant to Rule 65 ter(E) (i), 12 December 2003
Rule 98bis Decision	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the International Criminal Tribunal for the former Yugoslavia established by Security Council Resolution 827
SFRY	Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Socialist Federal Republic of Yugoslavia Criminal Code of 1977, as amended of 28 June 1990 (Amendment 38/90)
<i>Sikirica et al.</i> Sentencing Judgement	<i>Prosecutor v. Duško Sikirica, Damir Došen and Dragan Kolundžija</i> , Case No. 95-8-S, Sentencing Judgement, 13 November 2001
<i>Simić</i> Sentencing Judgement	<i>Prosecutor v. Blagoje Simić</i> , Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002
<i>Simić</i> Trial Judgement	<i>Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić</i> , Case No. IT-95-9, Judgement, 17 October 2003
Slovenia	Republic of Slovenia
<i>Stakić</i> Trial Judgement	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-T, Judgement, 31 July 2003
<i>Strugar</i> Appeals Chamber Decision on Jurisdiction	<i>Prosecutor v. Pavle Strugar, Miodrag Jokić &amp; Others</i> , Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002
<i>Strugar</i> Trial Chamber Decision on Jurisdiction	<i>Prosecutor v. Pavle Strugar, Miodrag Jokić &amp; Others</i> , Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Challenging Jurisdiction, 7 June 2002
T	Transcript of hearing in the present case. All transcript pages referred to in this judgement are taken from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
<i>Tadić</i> Appeals Judgement	<i>Prosecutor v. Duško Tadić aka "Dule"</i> , Case No. IT-94-1-A, Judgement, 15 July 1999

*Tadić* Jurisdiction Decision

*Prosecutor v. Duško Tadić aka “Dule”*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

*Tadić* Sentencing Appeal

*Prosecutor v. Duško Tadić aka “Dule”*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000

*Tadić* Trial Judgement

*Prosecutor v. Duško Tadić aka “Dule”*, Case No. IT-94-1, Judgement, 14 July 1997

TO

Territorial Defence

Tribunal

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

UN

United Nations

UNESCO

United Nations Educational, Scientific and Cultural Organisation

UNPROFOR

United Nations Protection Force

UNSC

United Nations Security Council

*Vasiljević* Appeals Judgement

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004

*Vasiljević* Trial Judgement

*Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002

VPO

Military Naval District

ZNG

Croatian National Guards Corps

### **ANNEX III: MAPS & PHOTOGRAPHS**

Annex III.A: Map of Croatia showing border with Serbia and Montenegro, and Bosnia and Herzegovina (Exhibit P9)

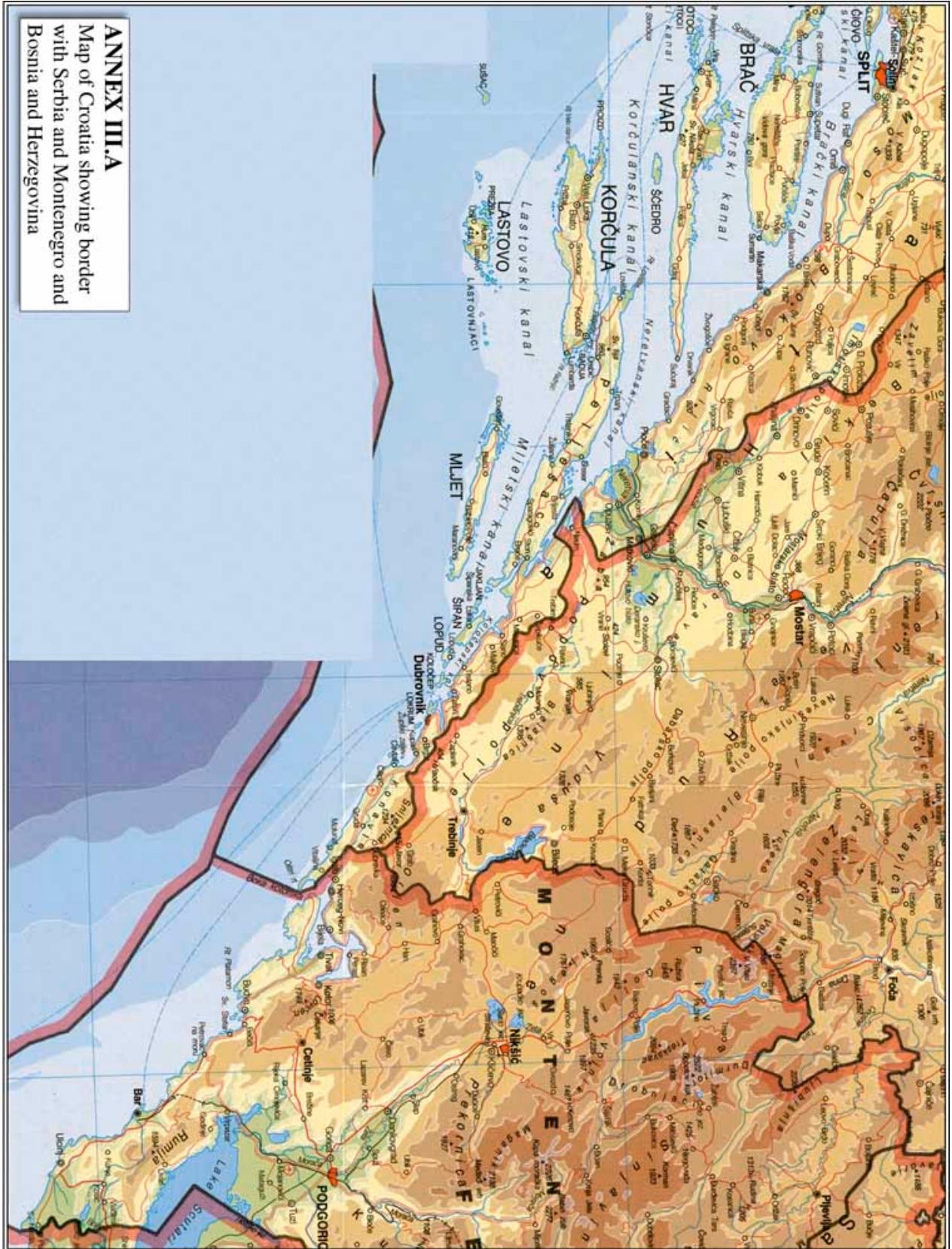
Annex III.B: Map of the wider Dubrovnik area (Exhibit P10)

Annex III.C: Aerial photograph of the Old Town of Dubrovnik (Exhibit P17)

Annex III.D: Photograph of the Old Town of Dubrovnik from Srd (Exhibit C1/2)

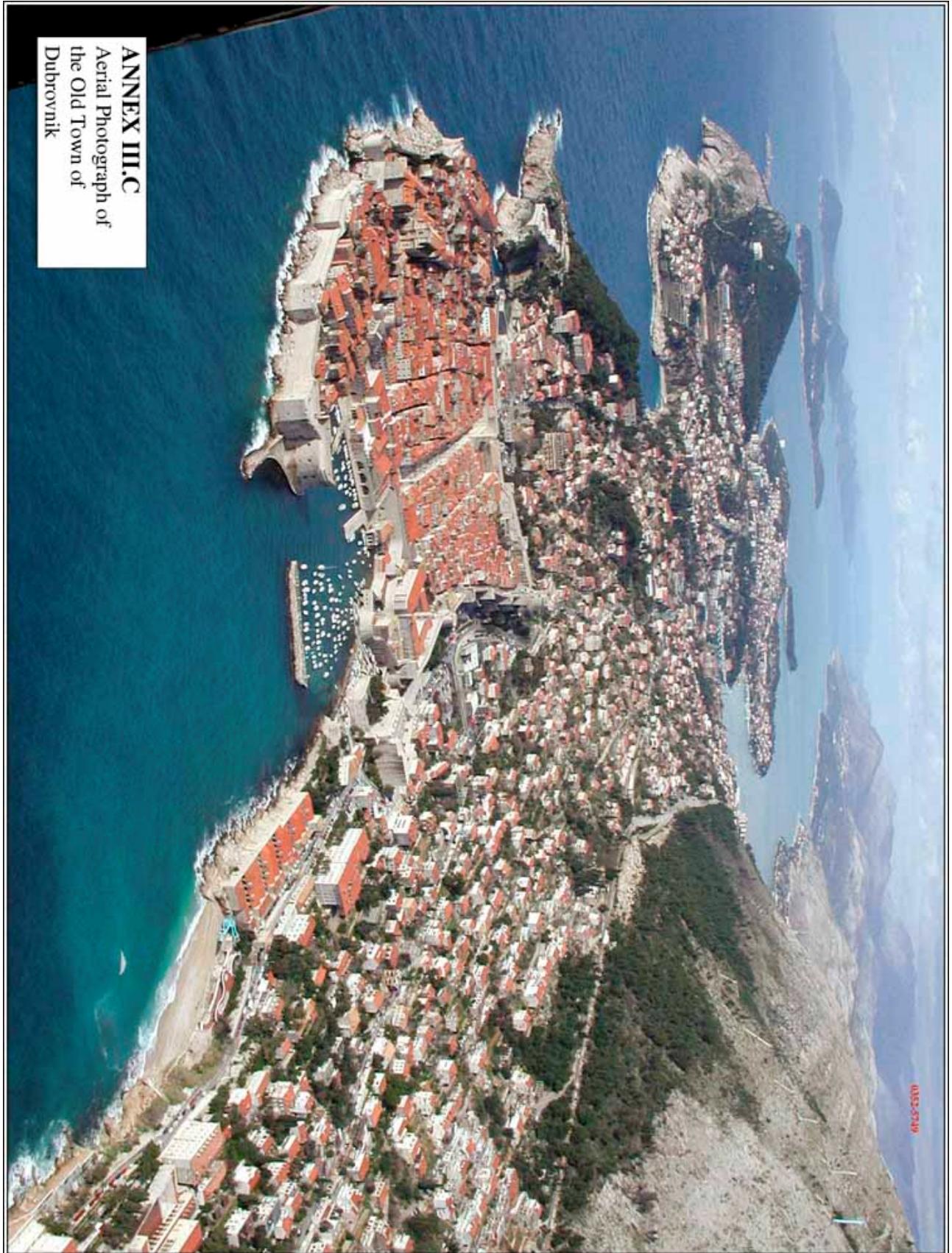
Annex III.E: Photograph of the Old Town of Dubrovnik from Žarkovica (Exhibit C1/2)

Annex III.F: Street Map of the Old Town of Dubrovnik (Exhibit C1/5)





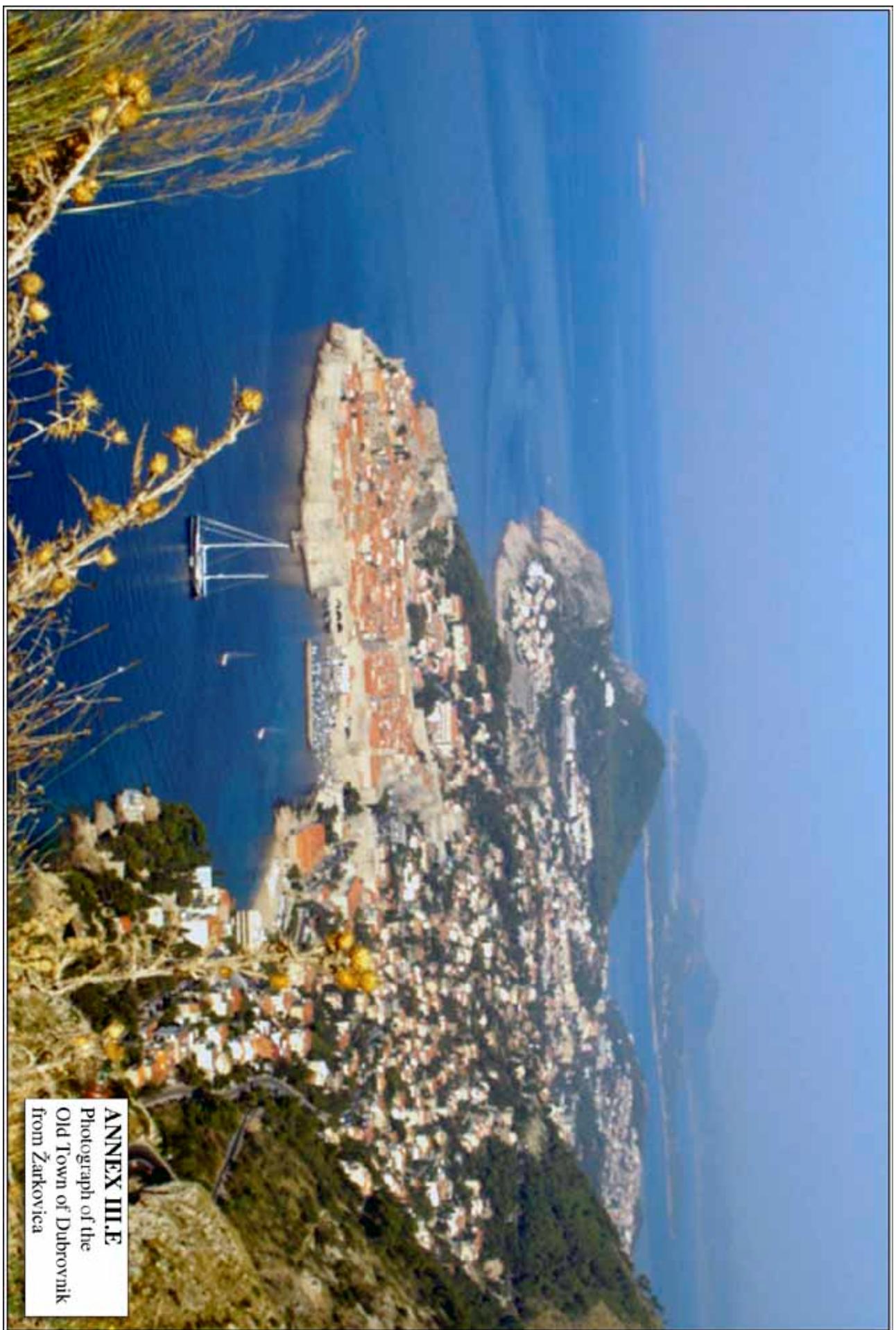
**ANNEX III.B**  
Map of the wider  
Dubrovnik area



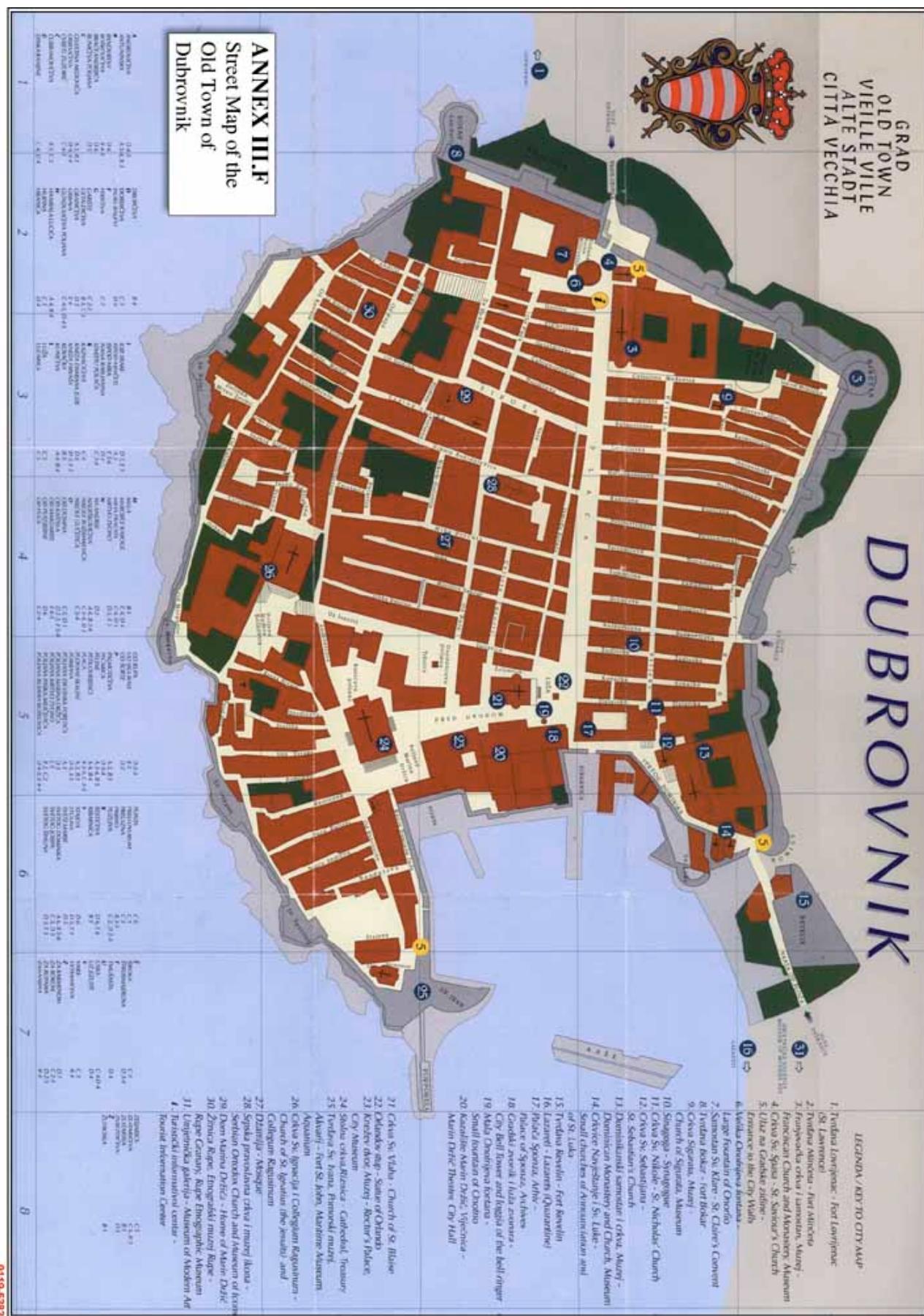
**ANNEX III.C**  
Aerial Photograph of  
the Old Town of  
Dubrovnik



**ANNEX III.D**  
Photograph of the  
Old Town of Dubrovnik  
from Srd



**ANNEX III.E**  
Photograph of the  
Old Town of Dubrovnik  
from Žarkovica



## ANNEX IV: PROCEDURAL HISTORY

### **A. Pre-trial proceedings**

#### **1. Indictment and initial appearance**

484. The Accused was initially indicted together with Miodrag Jokić, Milan Zec and Vladimir Kovačević. The indictment, confirmed on 27 February 2001 by Judge Patricia Wald, alleged fifteen counts of violations of the laws or customs of war punishable under Article 3 of the Statute and one count of grave breaches of the Geneva Conventions of 1949 punishable under Article 2 of the Statute in respect of each of the four accused. The acts and omissions forming the basis of the indictment were alleged to have occurred between 1 October 1991 and 31 December 1991.

485. The Accused surrendered voluntarily to the custody of the Tribunal on 4 October 2001 and was transferred to the UNDU on 21 October 2001. At his initial appearance, which took place on 25 October 2001 before Judge Rodrigues, the Accused pleaded not guilty to all counts in the indictment.

#### **2. History of indictments**

486. On 18 January 2002 the Defence filed a preliminary motion pursuant to Rule 72 alleging (i) lack of subject matter jurisdiction with respect to the charges of attacks on civilians and unlawful attacks on civilian objects and (ii) defects in the form of the indictment. The Trial Chamber dealt separately with each of these issues. On 7 June 2002 the Chamber dismissed the motion alleging lack of subject matter jurisdiction.<sup>1407</sup> This decision was confirmed by the Appeals Chamber on 22 November 2002.<sup>1408</sup> On 28 June 2002 the Chamber granted partly the motion alleging defects in the form of the indictment and ordered the Prosecution to amend the original indictment.<sup>1409</sup>

487. On 18 July 2002 the Prosecution sought withdrawal of the indictment against Milan Zec without prejudice. This was authorised by Trial Chamber I on 26 July 2002.<sup>1410</sup> An application to amend the indictment together with an amended indictment was filed by the Prosecution the same day.<sup>1411</sup> On 30 August 2002 the Defence opposed the Prosecution's application and filed a second preliminary motion alleging defects in the form of the indictment.<sup>1412</sup> By a decision of

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<sup>1407</sup> Decision on Defence Preliminary Motion Challenging Jurisdiction, 7 June 2002.

<sup>1408</sup> Decision on Defence Interlocutory Appeal, 22 November 2002.

<sup>1409</sup> Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002.

<sup>1410</sup> Order Authorising the Withdrawal of the Charges against Milan Zec without Prejudice, 26 July 2002.

<sup>1411</sup> Prosecutor's Amended Indictment and Leave to Amend, 26 July 2002.

<sup>1412</sup> Defence Response to the Prosecution Application for Leave to Amend the Indictment, 30 August 2002; Defence Second Preliminary Motion, 30 August 2002.

17 March 2003, the Trial Chamber granted the Prosecution's application to amend the indictment and simultaneously ordered the Prosecution to amend the proposed indictment.<sup>1413</sup> The new indictment (Amended Indictment) alleging fifteen counts of violations of the laws or customs of war pursuant to Article 3 of the Statute was filed on 31 March 2003. A third Defence motion alleging defects in the form of the indictment was denied by the Trial Chamber on 28 May 2003.<sup>1414</sup>

488. On 27 August 2003 the Prosecution filed a motion seeking leave to file a Second Amended Indictment *inter alia* limiting the charges *ratione temporis* to events occurring between 6 and 31 December 1991. Leave to amend was granted by the Trial Chamber by two consecutive decisions on 18 September 2003 and 13 October 2003. The Second Amended Indictment alleging six counts of violations of the laws or customs of war pursuant to Article 3 of the Statute was filed on 17 October 2003.

489. On 10 December 2003 following the guilty plea of Miodrag Jokić and the severance of the proceedings against Vladimir Kovačević, the Prosecution filed a Third Amended Indictment, which forms the basis for this Judgement.

### 3. Severance of proceedings and guilty pleas

490. On 27 August 2003 Miodrag Jokić pleaded guilty to six counts of violations of the laws or customs of war as alleged in the Second Amended Indictment. On 17 September 2003 Trial Chamber I separated the proceedings against Miodrag Jokić.<sup>1415</sup> Following the arrest of Vladimir Kovačević on 25 September 2003 and his transfer to the UNDU, on 18 November 2003, the Prosecution filed a motion to sever the proceedings against the Accused. Trial Chamber I granted the motion on 26 November 2003. By the same decision the Trial Chamber scheduled the commencement of trial for 9 December 2003 and vacated the order for the Accused's provisional release.<sup>1416</sup> The Defence's request for certification to appeal the Trial Chamber's decision was dismissed on 12 December 2003.<sup>1417</sup>

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<sup>1413</sup> Decision on the Prosecutor's Amended Indictment and Application for Leave to Amend, 17 March 2003.

<sup>1414</sup> Decision on the Defence's Third Preliminary Motion, 28 May 2003.

<sup>1415</sup> Order for Separation, 17 September 2003.

<sup>1416</sup> Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, 26 November 2003.

<sup>1417</sup> Decision on the Defence's Request for Certification to Appeal the Trial Chamber's Decision Dated 26 November 2003 on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, 12 December 2003.

#### 4. Order for provisional release

491. On 22 November 2001 the Defence filed a motion for the Accused's provisional release on the grounds of his serious medical condition. The motion was granted by Trial Chamber I on 30 November 2001.<sup>1418</sup>

#### 5. Commencement of trial and vacation of the Accused's order for provisional release

492. The Prosecution filed its pre-trial brief on 27 August 2003. The Defence pre-trial brief was filed on 1 October 2003.

493. In anticipation of the commencement of trial of the Accused, initially scheduled to begin on 9 October 2003, Trial Chamber I suspended the Accused's provisional release effective from 6 October 2003.<sup>1419</sup> The trial was adjourned on 1 October 2003 following Vladimir Kovačević's arrest on 25 September 2003.<sup>1420</sup> As a result, the Accused's provisional release was continued.<sup>1421</sup>

494. On 26 November 2003 Trial Chamber I severed the proceedings against the Accused, and scheduled the commencement of the trial for 9 December 2003.<sup>1422</sup> By the same decision, the Chamber vacated the order for the Accused's provisional release.

495. On 28 November 2003 the Defence requested adjournment of the trial and continuation of Accused's provisional release on medical grounds. On 2 December the Chamber confirmed its order of 27 November and granted the Accused a 24 hour extension to comply with its order vacating his provisional release.<sup>1423</sup>

496. As the Accused was not present at the seat of the Tribunal on 9 December 2003, the Trial Chamber delayed the commencement of the trial until further order.<sup>1424</sup>

497. The Accused was transferred to the United Nations Detention Unit on 12 December 2003. On 15 December 2003 the Trial Chamber scheduled the pre-trial conference for 15 December and

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<sup>1418</sup> Order on the Provisional Release of the Accused Pavle Strugar, 30 November 2001.

<sup>1419</sup> Order for Return to the United Nations Detention Unit, 24 September 2003.

<sup>1420</sup> Order Adjourning Trial, 1 October 2003.

<sup>1421</sup> Order for Continuance of Provisional Release, 1 October 2003.

<sup>1422</sup> Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, 26 November 2003.

<sup>1423</sup> Decision and Order Relating to the Accused Pavle Strugar's Request for Postponement, 2 December 2003.

<sup>1424</sup> Further Order Delaying the Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, 9 December 2003.

the start of the trial for 16 December 2003.<sup>1425</sup> The pre-trial conference was held on 15 December 2003 before Judge Orie.

## 6. Trial Chamber composition

498. On 22 October 2001 the President of the Tribunal assigned the case to Trial Chamber I comprising Judge Almiro Rodrigues, Judge Fuad Riad and Judge Liu Daqun. On 3 December 2001 by an order of Trial Chamber I Judge Alphons Orie was designated the pre-trial Judge in the matter.<sup>1426</sup>

499. On 15 December 2003 the President of the Tribunal assigned the case to Trial Chamber II, composed of Judge Kevin Parker (presiding), Judge Krister Thelin and Judge Christine Van Den Wyngaert.<sup>1427</sup>

## B. Trial proceedings

### 1. Overview

500. The Prosecution case commenced on 16 December 2003 and ended on 18 May 2004. The Defence case started on 28 June 2004 and ended on 22 July 2004. The Chamber sat for 100 trial days. The Prosecution called a total of 29 *viva voce* witnesses, among them 3 experts, and tendered two witness statements into evidence pursuant to Rule 92bis(C). 292 Prosecution exhibits were admitted. The Defence called 19 *viva voce* witnesses, among them 2 experts. In total, 119 Defence exhibits were admitted. The final briefs were filed on 31 August 2004 by the Prosecution and on 3 September 2004 by the Defence. Closing arguments were heard on 8 and 9 September 2004.

### 2. Matters relating to witnesses

501. Two written decisions on protective measures pursuant to Rule 75 were issued. The first, dated 16 January 2002, granted a Prosecution motion requesting such measures in relation to non-public materials disclosed to the Accused and his defence team.<sup>1428</sup> The second, granted a Prosecution motion for the testimony of a witness to be heard in closed session.<sup>1429</sup> Additional protective measures for witnesses were granted orally during the trial.

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<sup>1425</sup> Scheduling Order for the Pre-Trial Conference and the Commencement of the Trial Against Pavle Strugar and Decision on Pavle Strugar's Request for Postponement, 15 December 2003.

<sup>1426</sup> Order Designating Pre-Trial Judge, 3 December 2001.

<sup>1427</sup> Order Assigning Judges to a Case Before a Trial Chamber, 15 December 2003.

<sup>1428</sup> Order on Prosecution's Motions for Protective Measures, 16 January 2002.

<sup>1429</sup> Order for Protective Measures, 6 April 2004 (Confidential).

502. On three occasions the Chamber dealt with the issue of witnesses giving evidence by way of video-link. On 20 January 2004, the Chamber partially granted a Prosecution motion seeking to admit the evidence of twelve witnesses by way of video-conference link pursuant to Rule 71bis.<sup>1430</sup> On 16 April 2004, following a motion filed by the Prosecution, the Chamber issued a decision allowing a witness to give evidence via video-link from a federal facility in Tucson, United States.<sup>1431</sup> Finally, on 6 July 2004, the Chamber granted a Defence motion seeking to admit the evidence of witness Lieutenant-Colonel Jovanović by way of video-conference.<sup>1432</sup>

503. While subpoenas were issued to two individuals at the request of the Defence, it was later determined by the Defence that their evidence was not required.

### 3. Evidentiary issues

504. On 30 September 2003, the Prosecution filed a motion seeking leave to admit witness statements in lieu of oral testimony under Rule 92bis, and the statements of two deceased witnesses under Rule 92bis(C).<sup>1433</sup> The Chamber granted the motion in respect of the witness statements tendered under Rule 92bis(C), and denied it as to the other statements.<sup>1434</sup>

505. On 16 December 2003, the Defence raised an oral objection to those parts of the Prosecution opening statement which referred to evidence of shelling incidents, alleged to have been carried out by the Accused's subordinates, in the period preceding that charged in the Third Amended Indictment.<sup>1435</sup> The Chamber, while rejecting the Defence objection, limited the admission of evidence concerning prior shelling incidents to situations in which it went to prove the Accused's state of mind in relation to the acts charged in the Indictment.<sup>1436</sup>

506. The Chamber issued four decisions on the admission into evidence of expert reports pursuant to Rule 94bis. In a decision of 12 December 2003, the Chamber, dismissed the Defence objections to the qualifications of Dr John Allcock as an expert, and accepted his expert report.<sup>1437</sup> Following the Defence responses to the Prosecution's submissions of the expert reports of Major General Milovan Zorc and of Lieutenant-Colonel Jožef Poje, respectively, the Chamber rejected the

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<sup>1430</sup> Decision on the Prosecution Motion to Admit Evidence via Video-Conference Link, 20 January 2004.

<sup>1431</sup> Decision on the Prosecution Motion for Video-link Testimony, 16 April 2004.

<sup>1432</sup> Decision on the Defence Motion to Admit Evidence via Video-Conference Link, 6 July 2004.

<sup>1433</sup> Prosecution's Motion for Admission of Statements Pursuant to Rule 92bis of the Rules of Procedure and Evidence, 30 September 2003 (Confidential).

<sup>1434</sup> Decision on Prosecution Request to Admit Written Witness Statements Pursuant to Rule 92bis, 22 January 2004 (Confidential).

<sup>1435</sup> The Defence subsequently filed a written motion on this matter. See Defence Submission on Objection to the Prosecution's Opening Statement, 12 January 2004.

<sup>1436</sup> Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2002.

Defence objections and admitted both expert reports as evidence.<sup>1438</sup> On 22 July 2002, during the testimony of the witness, the Chamber admitted into evidence the expert report of Defence expert Janko Viličić. Finally, on 9 September 2004, the Chamber admitted the expert report of Dr Miodrag Šoć, to which the Prosecution had not objected, in a decision on the admissibility of that and other evidence.<sup>1439</sup>

507. Both parties filed motions for the admission of documentary evidence after the close of their respective cases. The Prosecution's motion was partially granted by the Chamber.<sup>1440</sup> Decision II was in respect of the Defence Motion of 22 July 2004<sup>1441</sup> and the Defence Submission of 26 July 2004,<sup>1442</sup> and by it the Chamber partially granted each of these motions.<sup>1443</sup> Decision III was in respect of the Defence Motion of 6 August 2004, which sought to have admitted certain documents as Defence evidence in rejoinder pursuant to Rule 85(A)(iv).<sup>1444</sup> The Chamber admitted into evidence one of the four documents proposed by the Defence.<sup>1445</sup>

#### 4. Access to documents

508. During the course of the trial, the Defence filed a motion requesting the Chamber to order the Government of the Republic of Croatia to produce certain documents pursuant to Rules 54 and 54bis.<sup>1446</sup> The Chamber found the documents requested by the Defence to be relevant to the case, and considered that the Defence had taken reasonable steps to obtain these documents.<sup>1447</sup> A hearing was scheduled, at which a representative of the Government of the Republic of Croatia agreed to disclose the requested documents to the Defence.<sup>1448</sup>

509. On 22 March 2004, the Defence filed a motion seeking access to the confidential plea agreement of Admiral Jokić, the Accused's former co-accused, and the supporting factual basis, along with any related annexes, in addition to the transcripts of the closed session portions of his

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<sup>1437</sup> Decision on the Defence Motion to Oppose Admission of an Expert Report Pursuant to Rule 94bis, 12 December 2003.

<sup>1438</sup> Decision on the Defence Motions to Oppose Admission of Prosecution Expert Reports Pursuant to Rule 94bis, 1 April 2004.

<sup>1439</sup> Decision II on the Admissibility of Certain Documents, 9 September 2004.

<sup>1440</sup> Decision on the Admissibility of Certain Documents, 26 May 2004.

<sup>1441</sup> Defence Motion: Requesting Admission of Proposed Defence Exhibits into Evidence, 22 July 2004.

<sup>1442</sup> Defence Submission: Requesting Admission of Outstanding Defence Exhibits Marked for Identification into Evidence, 26 July 2004.

<sup>1443</sup> Decision II on the Admissibility of Certain Documents, 9 September 2004.

<sup>1444</sup> Defence Motion: Pursuant to Rule 85(A)(iv), 6 August 2004 ("Defence Motion").

<sup>1445</sup> Decision III on the Admissibility of Certain Documents, 10 September 2004.

<sup>1446</sup> Defence Motion: Requesting Order from Trial Chamber Pursuant to Rule 54 and 54bis & Confidential Annex, 2 April 2004.

<sup>1447</sup> Scheduling Order for a Hearing Pursuant to Rule 54bis, 7 April 2004.

<sup>1448</sup> Scheduling Order for a Hearing Pursuant to Rule 54bis, 7 April 2004.

sentencing hearing.<sup>1449</sup> The Chamber referred the motion to Trial Chamber I, which had delivered the sentencing judgement in the *Jokić* case, for disposition.<sup>1450</sup> The requested access was granted to the Defence by Trial Chamber I on 23 March 2004.<sup>1451</sup>

### 5. Health of the Accused

510. The question of the fitness of the Accused to stand trial was raised for the first time by the Defence during the pre-trial conference on 15 December 2003. The following day, the Defence filed a motion for a medical examination of the Accused. The Chamber, having examined a written report prepared at the request of the Chamber and the medical records presented by the Defence, found no justification for ordering any further examination, but left it open for the Defence to pursue the issue further if necessary.<sup>1452</sup> On 12 February 2004, the Defence submitted a confidential motion to terminate proceedings, relying on the opinion of Professor Lečić-Toševski and the Accused's previous medical history. On 17 February 2004, the Chamber, on the motion of the Prosecution, issued a confidential order for a magnetic resonance imaging scan of the Accused to be done.<sup>1453</sup> On 22 March 2004, the Prosecution filed a medical report of the Accused prepared by Drs B Blum, V Folnegović-Šmalc and D Matthews. On 1 April 2004, the Chamber ordered that there should be a limited opportunity for each party to cross-examine on the medical reports relied on by the opposing party. On 28 and 29 April 2004, evidence from Professor Lečić-Toševski and Drs Blum and Matthews was heard. Written submissions, supplemented on 6 May 2004 by brief oral submissions, were then filed.

511. A decision on the matter was issued on 26 May 2004.<sup>1454</sup> The Chamber found that the Accused was fit to stand trial and the Defence motion was dismissed. The request of the Defence for certification to appeal was denied on 17 June 2004.<sup>1455</sup>

### 6. Rule 98bis Decision

512. After the close of the Prosecution case, the Defence filed a motion seeking entry of a judgement of acquittal pursuant to Rule 98bis in relation to all the counts in the Third Amended Indictment. The Chamber found that there was not sufficient evidence for a reasonable trier of fact

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<sup>1449</sup> Defence Motion Requesting the Acquisition of the Text of the Plea Agreement and the Factual Basis Thereof Made between Admiral Miodrag Jokić and the Prosecution, 19 March 2004.

<sup>1450</sup> Decision on Defence Motion Requesting Access to Miodrag Jokic's Plea Agreement and Related Documents, 23 March 2004.

<sup>1451</sup> Decision on Pavle Strugar's Request for Variation of Protective Measures, 23 March 2004.

<sup>1452</sup> Decision on the Defence Motion for a Medical Examination of the Accused Pursuant to Rule 74bis of the Rules, 19 December 2003.

<sup>1453</sup> Order for a Magnetic Resonance Imaging Scan of the Accused, 17 February 2004 (Confidential).

<sup>1454</sup> Decision Re the Defence Motion to Terminate Proceedings, 26 May 2004.

<sup>1455</sup> Decision on Defence Motion for Certification, 17 June 2004.

to sustain a conviction in respect of the allegation underlying Count 2 that Nikola Jović had been subjected to cruel treatment, or in respect of the allegations of damage to the buildings listed in Schedule II of the Indictment, other than those listed in the Annex to the decision. In all other respects, the Defence motion was denied.<sup>1456</sup>

## 7. Site visit

513. On 26 July 2004, the Prosecution filed a motion proposing that the Chamber conduct a visit to Dubrovnik, and identifying sites for the Chamber to view.<sup>1457</sup> The Defence responded with a motion filed on 3 August 2004, where it objected to some of the proposed sites, and presented its own list of sites.<sup>1458</sup> Between 1 and 4 September 2004, the Chamber undertook a site visit to Dubrovnik in Croatia to view various locations relevant to the case. The parties accompanied the Chamber and were given the opportunity to make observations throughout. Subsequently, the notes and observations of the parties and the Chamber were admitted into evidence, together with a record of the locations viewed, a video-recording of aspects of the visit and two maps.<sup>1459</sup>

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<sup>1456</sup> Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004.

<sup>1457</sup> Prosecution's Motion for the Trial Chamber to Conduct an On-Site Visit to Dubrovnik, 26 July 2004 (partly Confidential).

<sup>1458</sup> Defence Response: Partly Confidential-Prosecution's Motion for the Trial Chamber to Conduct an On-Site Visit to Dubrovnik, 3 August 2004.

<sup>1459</sup> Decision on the Admission of Evidence, 11 October 2004.